85-780

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JIM J. SHOEMAKE
(Counsel of Record)
F. VINCENT VATTEROTT
GUILFOIL PETZALL & SHOEMAKE
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

72pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether allegations of an isolated scheme by company officials for the purpose of obtaining a favorable year-end audit of the company's financial statements, which involved more than two predicate acts of mail and wire fraud but which lacked a threat of continuity, constitutes the conduct of an enterprise through a "pattern of racketeering activity" for purposes of a violation of 18 U.S.C. § 1962(c)?

2. Whether an auditor's alleged claims for fees left unpaid after reporting the client to the SEC, for legal and other expenses incurred in defending its own professional conduct to the SEC, and for the resultant loss of business reputation are injuries proximately caused by the "conduct causing the violation" as the Supreme Court required in *Sedima* for standing to sue under 18 U.S.C. § 1964(c)?

PARTIES TO THE ACTION

Petitioner, defendant below, is Tiffany Industries, Inc., a publicly-held company which manufactures office furniture and exports grain-handling and storage equipment. Petitioner's subsidiaries and affiliates are listed in the Appendix (App. A-51). Farrell Kahn and Gail Martin were also defendants below.

Respondent, plaintiff below, is Alexander Grant & Company, a partnership engaged nationally in public accounting

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Parties To The Action	ii
Table Of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	3
Statement Of The Case	4
Reasons For Granting The Writ	6
I. The Eighth Circuit Has Failed To Follow The Guidance Of This Court's Decisions In *Sedima* and *American National Bank*	6
A. The Meaning Of A Pattern Of Racketeering Activity	6
B. Proximate Causation Between The Conduct Constituting The Violation and the Injury Alleged	8
Conclusion	10
Appendix:	
A. August 7, 1985 Opinion of Court of Appeals	A-1
B. August 22, 1984 Opinion of Court of Appeals	A-6
C. Opinion of District Court	A-18
D. Complaint	A-22
E. Statutory Provisions Involved	A-39
F. Petitioner's Subsidiaries and Affiliates	A-51

TABLE OF AUTHORITIES

Cases:

Alexander Grant & Company v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir.), *cert. granted,* 53 U.S.L.W. 3914 (U.S. July 2, 1985); *on remand,* Slip Op. (8th Cir. August 7, 1985) 2, 5, 6, 8

American National Bank v. Haroco, Inc., 473 U.S. ____, 53 U.S.L.W. 5067 (U.S. July 1, 1985) 4, 5, 6

Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir.), *cert. denied,* 459 U.S. 880 (1982) 4

Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir.), *aff'd,* 473 U.S. ____, 53 U.S.L.W. 5067 (U.S. July 1, 1985) 9

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. ____, 53 U.S.L.W. 5034 (U.S. July 1, 1985) ..... *passim*

Statutes:

18 U.S.C. § 1341 4

18 U.S.C. § 1343 4

18 U.S.C. § 1961 7

18 U.S.C. § 1961(5) 3

18 U.S.C. § 1962(c) 6

18 U.S.C. § 1964(c) ..... *passim*

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Tiffany Industries, Inc. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered August 7, 1985.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit dated August 7, 1985 is not yet reported and is reprinted in the Appendix (App. A-1). The Opinion of the United States Court of Appeals for the Eighth Circuit dated August 22, 1984 is reported at 742 F.2d 408 (8th Cir. 1984) and is reprinted in the Appendix (App. A-6).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on August 7, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 - 68 is reprinted in the Appendix (App. A-39).

Section 1961(5) of that act provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Section 1964(c) of that act provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Alexander Grant & Company ("Grant") brought suit against Tiffany Industries, Inc. ("Tiffany"), and two of its employees in February, 1979, alleging a civil violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). The RICO claim was predicated on allegations of Tiffany's use of the mail or the telephone to justify accounting entries claimed to be fraudulent. 18 U.S.C. § 1341, 1343. The communications, according to the complaint, were part of a single fraudulent scheme to obtain a favorable year-end audit of Tiffany's 1977 financial statements. Grant discovered and, later, disclosed the scheme. Grant sought treble damages for past due accounting fees, injury to reputation and legal and other expenses incurred.

On Petitioner's motion, the District Court dismissed the action on December 30, 1982 for failure to allege an injury of the type redressable under RICO. The District Court followed the reasoning of the Seventh Circuit in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.) *cert. denied,* 459 U.S. 880 (1982), a case described by the District Court as "strikingly similar to the facts in this matter", which held that the objectives and purpose of RICO would not be served by permitting the action. (App. A-20). On August 22, 1984, the District Court's decision was reversed by the Eighth Circuit Court of Appeals which held that Grant had alleged an injury within the meaning of 18 U.S.C. § 1964(c). On October 31, 1984, the Eighth Circuit denied Tiffany's petition for rehearing.

Tiffany filed its petition for certiorari on January 3, 1985, and requested that this Court review the Eighth Circuit's judgment of August 22, 1984. On July 2, 1985, immediately after this Court's decisions in *Sedima, S.P.R.L. v. Imrex, Co.,* 473 U.S. ____, 53 U.S.L.W. 5034 (U.S. July 1, 1985) and *American National Bank v. Haroco, Inc.,* 473 U.S. ____, 53 U.S.L.W.

5067 (U.S. July 1, 1985), Tiffany's petition for certiorari was granted and the Eighth Circuit's judgment vacated. 53 U.S.L.W. 3914 (U.S. July 2, 1985). The case was remanded to the Eighth Circuit with instructions "for further consideration in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. ____ (1985) and *American National Bank v. Haroco, Inc.*, 473 U.S. ____ (1985)."

On August 7, 1985, the Eighth Circuit issued its second decision in this case, upholding the previous result and finding that the appellant Alexander Grant & Company had standing to sue under 18 U.S.C. § 1964(c). Tiffany now seeks review of the August 7, 1985 judgment of the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

Immediately following the *Sedima* and *American National Bank* decisions Tiffany's petition for a writ of certiorari to review the August 22, 1984 judgment of the United States Court of Appeals for the Eighth Circuit was granted on July 2, 1985. The Order granting certiorari vacated the Eighth Circuit judgment and remanded for "further consideration in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. ____ (1985) and *American National Bank v. Haroco, Inc.*, 473 U.S. ____ (1985)." 53 U.S.L.W. 3914 (U.S. July 2, 1985).

The Eighth Circuit issued a new decision August 7, 1985 which upheld that Court's prior result though eliminated its previous "something more" than injury from predicate acts standing requirement. However, the Eighth Circuit failed to adhere to the Supreme Court's guidance on the meaning of a "pattern of racketeering activity" and the requirement of proximate causation between the violative conduct and the alleged injury.

Due to the failure of the Eighth Circuit to follow this Court's specific direction to reconsider its prior holding in light of *Sedima* and *American National Bank,* Tiffany and other litigants within the Eighth Circuit are extremely prejudiced. This case and these issues are therefore ripe for review.

I.

The Eighth Circuit Has Failed To Follow The Guidance Of This Court's Decisions In Sedima and American National Bank.

A. The Meaning Of A Pattern Of Racketeering Activity.

In *Sedima,* this Court examined the meaning of the term "pattern" in the context of describing the elements of a violation of 18 U.S.C. § 1962(c). The Court stated:

> A violation of § 1962(c)...requires (1) conduct (2) of an enterprise (3) through a pattern[14] (4) of racketeering activity.

The now famous footnote fourteen pointed out that the definition of a pattern of racketeering activity differs from other defined terms in § 1961 in that a pattern "*requires* at least two acts of racketeering activity," not that it "means" two such acts. From this distinction, this Court determined "...that while two acts are necessary, they may not be sufficient." (emphasis added by the Court). *Sedima, supra,* 53 U.S.L.W. at 5038, n.14.

In determining what would constitute the necessary pattern, the Court focused on directions provided in the legislative history and quoted from the Senate Report on RICO as follows:

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern. S. Rep. No. 91-617, p. 158 (1969) (emphasis added by the Court).

Id.

The Supreme Court's discussion of the meaning of a pattern of racketeering activity emphasized that isolated, sporadic acts of racketeering with no threat of continuity were not sufficient to constitute a pattern, and were not intended by the drafters of RICO to be punished by the statute's civil remedy, 18 U.S.C. § 1964(c).

The explanation and guidance on the meaning of pattern provided by the Supreme Court was not followed by the Eighth Circuit upon remand of this case. Rather, the Eighth Circuit held that the multiple acts of mail and wire fraud allegedly committed in the furtherance of an alleged isolated scheme to defraud

auditors into certifying inflated 1977 year-end financial statements were sufficient to constitute the necessary pattern. *Alexander Grant v. Tiffany Industries, Inc.*, No. 83-1608 Slip Op. at 3, n.1. (8th Cir. August 7, 1985). Completely absent from the Eighth Circuit's analysis of the concept of pattern was any discussion of the threat of continuity of the racketeering behavior. The allegations of Grant's complaint speak of a single fraudulent scheme and make no mention of a threat of a continuing pattern of racketeering activities. Complaint, ¶¶ 12-14.

Under the Eighth Circuit's analysis, isolated activity such as multiple mailings of a single fraudulent or misleading prospectus which might lead to several purchases of the same security would constitute a pattern of racketeering activity. Though such mailings may have similar purposes, victims and results, there is no evidence of continuity. This threat of continuity is the crucial element which distinguishes those that the drafters of the RICO statute intended to punish: criminals that conduct their businesses through the repeated use of racketeering to accomplish their illegal intentions. Although isolated occasions of fraudulent conduct are also punishable under existing criminal and civil law, such conduct was not the target of RICO's particularly potent provisions.

The Eighth Circuit's interpretation and application of the pattern requirement to the isolated fraudulent scheme alleged in this case is therefore incorrect and reflects a departure from the Supreme Court's directive on this issue. Accordingly, this Court should grant Tiffany's petition and reverse the Eighth Circuit's judgment.

B. Proximate Causation Between The Conduct Constituting The Violation and the Injury Alleged.

In *Sedima, supra,* the Supreme Court explained the requirement of allegations of a causal relationship between the alleged illegal conduct and the alleged injury:

> [T]he plaintiff only has standing if, and can only recover to the extent that he has been injured in his business or property *by the conduct constituting the violation.* As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured *by other conduct,* nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384, 398 (1984), *aff'd,* post, p. ____. (emphasis added).

Sedima, supra, 53 U.S.L.W. at 5039.

Upon remand of this case after this Court's Order granting Tiffany's petition for a writ of certiorari, the Eighth Circuit failed to adhere to these established guidelines of proximate causation. Although Tiffany pointed out that Grant's alleged injuries were not caused by the "conduct causing the violation" as this Court requires, but, if at all, by other conduct of Tiffany, the Eighth Circuit rejected that argument. Instead, the Eighth Circuit adopted what amounts to a "but for" test of causation which improperly expands the scope of injuries redressable in a civil RICO claim.

For example, the Eighth Circuit recognized Grant's allegation that it spent more time on the audit than it normally would have because of Tiffany's allegedly fraudulent conduct, and that Tiffany's later failure to pay constituted a "theft of its services," as an injury sufficient to confer standing under 18 U.S.C. § 1964(c). However, Grant's alleged claim for lost accounting fees was not proximately caused by Tiffany's alleged acts of mail and wire fraud but instead, as alleged, by Tiffany's *later* decision not to pay Grant. Complaint, ¶ 21.

Grant's other claims of injury are similarly defective. Its legal fees and other expenses were not caused by the mail and wire fraud scheme alleged, but rather, according to Grant's own allegations, by the SEC's investigation of Grant's role in the

scheme. Likewise, the claimed injury to business reputation flows not from the prohibited scheme, but from Tiffany's alleged post-discovery efforts to conceal and mischaracterize the scheme.

The Eighth Circuit's decision to recognize such allegations of injury as sufficient to confer standing to sue under § 1964(c) is therefore erroneous and improperly expands the scope of injuries redressable in a civil RICO claim far beyond the guidelines set down by this Court in *Sedima*. Accordingly, this Court should grant Tiffany's petition and reverse the Eighth Circuit's judgment.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

Jim J. Shoemake
F. Vincent Vatterott
GUILFOIL, PETZALL & SHOEMAKE
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for petitioner
Tiffany Industries, Inc.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1608

Alexander Grant and Company,
Appellant,

v.

Tiffany Industries, Inc., Farrell Kahn
and Gail Martin,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: August 5, 1985
Filed: August 7, 1985

Before ROSS, JOHN R. GIBSON, and BOWMAN,
Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

By order of the Supreme Court, the appeal of Alexander Grant and Company is before us again for further consideration in light of the recent decisions in *Sedima, S.P.R.L. v. Imrex Co.*, 53 U.S.L.W. 5034 (U.S. July 1, 1985), and *American National Bank & Trust Co. v. Haroco, Inc.*, 53 U.S.L.W. 5067 (U.S. July 1, 1985). *See Tiffany Industries v. Alexander Grant*

& Co., 53 U.S.L.W. 3914 (U.S. July 2, 1985) (No. 84-1084) (granting certiorari and vacating the judgment below); *Kahn v. Alexander Grant & Co.*, 53 U.S.L.W. 3914 (U.S. July 2, 1985) (No. 84-1222) (same). We earlier held that Grant has standing and has asserted a sufficient racketeering enterprise injury to state a claim in its action against Tiffany Industries, Inc., company president Farrell Kahn, and secretary Gail Martin under the civil damage provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1982). *Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408 (8th Cir. 1984). We readopt those portions of our earlier opinion that we believe are not in conflict with *Sedima* and again remand so that Grant may proceed on its claims.

Grant, a public accounting firm, alleges that it was injured as the result of a pervasive scheme of mail and wire fraud designed by Tiffany to obtain a favorable audit for the fiscal year 1977. In *Sedima* the Supreme Court considered whether any such injuries, to be actionable, had to arise from an activity of a nature which RICO was designed to deter rather than merely from certain of the individual predicate acts which comprised the racketeering.

The Court made plain that no "racketeering injury" is required. 53 U.S.L.W. at 5038; *American National,* 53 U.S.L.W. at 5068. Observing that section 1964(c) authorizes suit by "[a]ny person injured in his business or property by reason of a violation of § 1962," the Court stated,

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Sedima, 53 U.S.L.W. at 5038 (footnote omitted).

Sedima states that a plaintiff, as here, seeking to state a claim based on a violation of section 1962(c) must allege "(1) conduct (2) of an enterprise (3) through a pattern[1] (4) of racketeering activity." *Id.* (footnote omitted). The compensable injury then necessarily is

> the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. * * * Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Id. at 5039.

Point II of our earlier opinion in *Grant*, 742 F.2d at 413-14, is contrary to *Sedima* in that we accepted that some type of "racketeering enterprise injury" was necessary but declined to further define the nature of such an injury because we found it "clear that Grant's complaint does not simply allege injury

---

[1] Kahn argues on reconsideration that Grant has failed to allege a "pattern" of racketeering activity. In our opinion, however, we expressly observed that Tiffany had not challenged the sufficiency of the pleading as to the substantive RICO violation under section 1962(c). *Grant*, 742 F.2d at 411. We need not consider issues thus raised for the first time at this juncture. *Cf. Goldsmith v. Diamond Shamrock*, No. 84-2269, slip op. at 4 (8th Cir. June 28, 1985). Furthermore, while *Sedima* emphasizes that the definition of pattern in section 1961(5) requires something more than just two acts of racketeering activity, 53 U.S.L.W. at 5038 n.14, the complaint in this case alleges some twenty-six acts of mail fraud and four acts of wire fraud (the amended complaint alleges forty-eight and ten acts respectively). The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity. *See id.* (drawing analogy to 18 U.S.C. § 3575(e) (1982)).

from the underlying predicate acts." 742 F.2d at 413. Accordingly, that discussion and holding essentially have been overruled. Since, however, our error was in requiring that Grant allege *more* than the Supreme Court has now said a plaintiff must allege in order to state a civil RICO claim, we believe our ultimate directive was the proper one: Grant is entitled to pursue its allegations on the merits.

Tiffany, to the contrary, argues on reconsideration that *Sedima* instead requires that we reverse our holding that Grant has standing to bring suit under section 1964(c). The Supreme Court in *Sedima* stated that a plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." 53 U.S.L.W. at 5039. Tiffany asserts that Grant failed to plead that the injuries it suffered were proximately caused by "the conduct constituting the violation" rather than by other conduct of Tiffany. The complaint, however, contains the following specific allegations, which we believe are sufficient:

> Had Grant been aware of the activities of defendants as above alleged, it would not have performed any accounting services for Tiffany in connection with the 1977 audit. As a result of the fraudulent conduct of defendants * * * the personnel of Grant continued to perform accounting services for defendant, all to Grant's injury to its business and property.
>
> * * * *
>
> As the result of the SEC [Securities and Exchange Commission] investigation, which was necessitated by and resulted directly from the unlawful and fraudulent actions of defendants, Grant has incurred substantial expense in responding to SEC subpoenas and requests for documents, interviews, the giving of testimony, counsel fees related to same, and other related expenses.

> As a further result of the unlawful and fraudulent actions of defendants and their continued effort to conceal such actions, Grant has been damaged in its reputation as a national independent public accounting firm.

Record at 17-18.

The brief mention of causation in *Sedima* cannot fairly be interpreted as reading into section 1964(c) a direct injury versus indirect injury distinction. On the contrary, the approach of the Supreme Court but underscores our conclusion that Grant has standing to assert its claims.[2] *See Sedima*, 53 U.S.L.W. at 5039 n.15. We find nothing in our discussion in Point I of our earlier opinion, 742 F.2d at 411-12, in conflict with the opinions of the Supreme Court in either *Sedima* or *American National;* accordingly, we readopt that reasoning and discussion.

We remand this case to the district court for further proceedings consistent with this opinion and the decisions of the Supreme Court in *Sedima* and *American National*.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[2] Similarly, we cannot accept Kahn's arguments that the "by reason of" language of section 1964(c) should be read as importing into civil RICO actions the standing requirements of section 4 of the Clayton Act. 15 U.S.C. § 15 (1982). Such an approach would merely reintroduce into the cause of action certain elements rejected by the Supreme Court in *Sedima* in its discussion of the nature of the injury to be alleged. We believe that the direct language of the Court quoted herein makes plain the full extent of a plaintiff's obligation with respect to standing and that that obligation has been satisfied in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1608

ALEXANDER GRANT AND COMPANY,
Appellant,

vs.

TIFFANY INDUSTRIES, INC., Farrell Kahn and Gail Martin,
Appellees.

Submitted Jan. 13, 1984.
Decided Aug. 22, 1984.

Before ROSS, JOHN R. GIBSON and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Alexander Grant and Company, a public accounting firm, appeals the dismissal of its complaint brought against its former client, Tiffany Industries, and certain Tiffany officials and employees under Title IX, the Racketeer Influenced and Corrupt Organizations (RICO) provision of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, codified at 18 U.S.C. §§ 1961-1968 (1982). The district court, 563 F.Supp. 35 (E.D.Mo. 1982), relying on the Seventh Circuit's decision in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.), *cert. denied,* 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982), dismissed the complaint under Fed.R.Civ.P. 12(b)(6) on the ground that Grant lacked standing to sue under RICO's civil remedy provision. It also denied Grant's motion to file an amended complaint. Grant argues on appeal that the district court erred in dismissing its RICO claim and that it abused its discretion in denying Grant's motion to file the amended complaint. We reverse and remand for further proceedings.

Grant was retained by Tiffany from 1970 through May, 1978. In 1979, Grant filed an actin under RICO's civil remedy provision, 18 U.S.C. § 1964(c), against Tiffany, its president, Farrell Kahn, and Kahn's secretary Gail Martin. Grant claimed that it was the target of a prevasive scheme of mail and wire fraud designed by the defendants to obtain a favorable audit for the fiscal year 1977. Tiffany allegedly sought the favorable audit to obtain credit on better terms and to mislead its stockholders and the Securities & Exchange Commission into believing that the company was financially healthy.

For purposes of reviewing the district court's dismissal of Grant's complaint under Fed.R.Civ.P. 12(b)(6), we must accept as true all of Grant's material allegations and liberally construe the complaint in its favor. *Loge v. United States,* 662 F.2d 1268, 1270 (8th Cir. 1981), *cert. denied,* 456 U.S. 944, 102 S.Ct. 2009, 72 L.Ed.2d 466 (1982). The first allegation is that Kahn, in an effort to inflate the value of Tiffany inventory, falsely represented to Grant that Steelabrade Corporation, a supplier of products to Tiffany, held $500,000 worth of Tiffany inventory as of March, 1978. Grant requested confirmation of this claim from Steelabrade president James Murphy. Kahn and Martin, knowing Murphy would not comply, instead requested that he compile a schedule of all purchases of Steelabrade products by Tiffany during 1977. The two then attached a copy of Grant's confirmation request to the schedule and fraudulently inserted language above Murphy's signature stating that "[t]his inventory was at our premises at December 31, 1977, and March 1, 1978." These documents were then mailed to Grant.

Grant's second claim of fraud concerns an alleged sale of $3,500,000 worth of Tiffany products to the government of Nigeria. Grant learned through the course of its audit that a substantial portion of the products sold had not yet been purchased by Tiffany. Grant questioned whether Tiffany could, under these circumstances, record in its financial statements the substantial earnings resulting from this sale. In response, Tiffany personnel stated that the sale should be certified because

they had issued purchase orders for the products as of June 30, 1977, and that the products were held by ten suppliers who were simply awaiting further shipping instructions. Grant requested confirmation of this claim from the ten suppliers. Kahn and Martin backdated purchase orders and mailed to Grant forged letters from the suppliers confirming the representations made by Tiffany personnel. Grant, still apprehensive, sought "reconfirmation" of the same information. Kahn and Martin then pressured six suppliers to sign and mail reconfirmation letters back to Grant.

Grant further asserts that Kahn and Martin typed two letters at Tiffany's St. Louis County offices allegedly from Nigerian bank officials. The two letters, one a forgery and the other "on information and belief" a forgery, represented that the two banks had extended $3,500,000 in loan commitments to the Nigerian government to enable it to purchase the Tiffany products. Grant also claims that Tiffany used false information to persuade four independent public accounting firms to certify the Nigerian sale, thereby pressuring Grant to do the same. These certifications were then mailed to Grant. By April, 1978, Grant suspected that it was being defrauded and reported its concerns to the Securities & Exchange Commission as required by SEC regulations.

Grant concludes its complaint with the allegation that Tiffany's actions constitute a substantive RICO violation under 18 U.S.C. § 1962(c).[1] It asserts that mail fraud, 18 U.S.C. § 1341, and wire fraud, *id.* § 1343, are two of the acts included in the

---

[1] Section 1962(c) provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

definition of "racketeering activity,"[2] that the defendants carried out two or more such acts within a ten-year period, thus establishing a "pattern of racketeering activity,"[3] and that Tiffany is an interstate "enterprise"[4] conducted by defendants through a pattern of racketeering activity. Grant further asserts that it is entitled to civil damages for this violation under 18 U.S C. § 1946(c).[5]

The district court denied Grant's motion to file an amended complaint. The amended complaint names additional Tiffany officials as defendants and recites the foregoing with far greater specificity and clarity. It also incorporates additional claims of fraud; the original complaint includes 26 acts of mail fraud and 4 acts of wire fraud while the amended complaint reveals 48 and 10 instances, respectively. Included in the amended complaint are the following additional allegations: (1) Tiffany officials were negotiating with seven insurance companies for $9,000,000 in loans when it discovered in June, 1977 that, if generally accepted accounting principles were used, it was operating at a

---

[2] "Racketeering activity" is defined as, *inter alia*, "any act which is indictable under any of the following provisions of title 18, United States Code: * * * section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) * * *." 18 U.S.C. § 1961(1)(B).

[3] A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity * * the last of which occurred within ten years * * after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[4] "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[5] 18 U.S.C. § 1964(c) provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962 * *."

loss for the year; (2) Tiffany officials forged at least some of the "reconfirmation" letters from those suppliers who either refused or ignored Kahn's request that they assure Grant that they held Tiffany inventory bound for Nigeria; (3) Tiffany officials forged a third letter and a telex from officers of Nigeria banks that confirmed the $3,500,000 loan commitment to the Nigerian government; and (4) Tiffany officials further defrauded Grant by representing that Tiffany "farm stores" held inventory in excess of its actual value. The officials also pressured the managers of these stores to send false certifications to Grant and to make phony offers to purchase their inventories at inflated prices.

Grant asserts the it was damaged in three respects as a result of Tiffany's fraudulent representations. First, it claims that it suffered "theft of services," *i.e.*, the fraud required it to spend substantially more time on the Tiffany audit with a commensurate increase in fees, none of which have been paid. Second, it contends that the SEC investigation caused it to spend large amounts for attorneys' fees, document requests, and other expenses. Third, Grant argues that the fraud caused it to suffer damages to its business reputation.

I. Standing

The district court did not hold, nor does Tiffany argue, that Grant has failed to plead facts sufficiently alleging that Tiffany committed a substantive violation of RICO under section 1962(c).[6] Rather, the district court relied on *Cenco* and its

---

[6] *See supra* note 1. We do observe that Grant's original complaint alleges that Tiffany is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983), failed to state a claim. Tiffany does not raise this point on appeal. We note, however, that Grant's amended complaint alleges that, in addition to Tiffany, two other distinct "enterprises" existed. The first consists of an

holding that the accounting firm in that case suffered only "indirect" injury insufficient to grant it standing under section 1964(c).[7] Grant asserts that *Cenco* should not be adopted as the law of this circuit because its restrictive interpretation has no basis in the language or legislative history of RICO. It further argues that, in any event, this case is distinguishable from *Cenco* because Grant has been "directly" injured by Tiffany's fraudulent practices. Tiffany argues that *Cenco* was properly decided and that Grant has suffered the same indirect injury alleged by the accounting firm in that case.[8]

---

association in fact of the six named individuals alleged in the amended complaint to have participated in the fraud. The second consists of all Tiffany employees.

[7] *See supra,* note 5. The term "indirect injury" discussed in *Cenco* has also been used as a synonym for the "commercial" or "competitive" injury requirement. *See, e.g., Schacht v. Brown,* 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983). It has been suggested that this requirement, borrowed from antitrust law, is applicable to RICO because the statute's legislative history reveals that it was "intended in part to combat the threat posed by racketeer influences in the free market system." *Bennett,* 685 F.2d at 1059. We explicitly rejected in *Bennett* any "commercial" or "competitive" injury restriction on standing under RICO. *Id. See also* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 255 n. 52 (1982).

[8] Appellee Kahn argues separately that Grant's injury is insufficient because it was not a victim in the "target area" of the alleged RICO violation. He asserts that this concept, derived from standing tests developed under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), is applicable to RICO plaintiffs. Recognizing that we declined in *Bennett* an invitation to apply antitrust standing restrictions to RICO plaintiffs, *see supra* note 7, Kahn does not argue that Grant satisfies the target area test only if it suffers "commercial" or "competitive" injury. Rather, Kahn asserts that Grant must "loan Tiffany money, buy its stock or otherwise extend economic benefits to [it] * * *" to have standing. Appellee's Brief at 20. We believe that this reasoning is simply an alternative means of characterizing Grant's injury as "indirect," and therefore feel it merits no analysis independent of our discussion of *Cenco.*

We believe that Cenco is distinguishable from this case. In *Cenco,* the accounting firm of Seidman & Seidman was a co-defendant with Cenco, Inc., in a class action brought by persons who had purchased Cenco stock at allegedly inflated prices due to the company's fraudulent representations. The co-defendants cross-claimed against each other. Seidman argued that it too had been defrauded by Cenco and sought as damages under RICO indemnification for its liability to the shareholders. In this case, Grant seeks not indemnification but damages for the amount of its lost fees, the amount spent by reason of the SEC investigation, and the amount representing its loss of business reputation. We believe there are direct injuries, distinguishable from a claim for indemnification which, by its very nature, is secondary and indirect.

Second, and more compellingly, we are unpersuaded by the reasoning employed in *Cenco.* Judge Posner, writing for the panel, reasoned that the case was one of first impression and that the "language of section 1964(c) provides no answer * * * and there is no useful legislative history relating to the provision." *Cenco,* 686 F.2d at 457. The opinion thus focused on whether recognizing a cause of action in favor of Seidman would be consistent with the "compensatory and deterrent objectives of RICO" and would comport with its primary purpose of "cop[ing] with the infiltration of legitimate businesses.' " *Id.* (quoting *United States v. Turkette,* 452 U.S. 576, 591, 101 S.Ct. 2524, 2532, 69 L.Ed.2d 246 (1981)). The court concluded that the objectives and purposes of RICO would not be served by permitting such actions, and also expressed concern with the volume of treble damage lawsuits an opposite decision might spawn.[9]

---

[9] The particular language in *Cenco* is as follows:

> It is presumably on behalf of the owners, perhaps also the customers and competitors, of such businesses that the civil damages remedy was created, and not on behalf of the people

We cannot agree that Grant's standing under section 1964(c) is to be determined by means of an appeal to RICO's purpose and objectives. Section 1964(c) provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962 * * *." This language is unambiguous and, "in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Russello v. United States*, ____ U.S. ____, ____, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983) (quoting *Turkette*, 452 U.S. at 580, 101 S.Ct. at 2527). We find no legislative history supporting the direct-indirect dichotomy; indeed, to the extent that the concept of indirect injury is a surrogate for concerns of federal-state relations and crowded court dockets, the legislative history indicates that Congress recognized that these were necessary costs in the fight against organized crime. *See* Blakey, supra note 7, at 280. It is simply "beyond our authority to restrict the reach of the statute" in this manner. *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *see generally Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983).

We also observe that Judge Posner, in the post-*Cenco* decision of *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984), determined the scope of RICO with considerably greater

---

> who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO. It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

686 F.2d at 457.

deference to its plain language than he did in *Cenco*.[10] We believe that *Sutliff* robbed *Cenco* of much of the precedential value accorded it by the district court. Insofar as the approaches in the two cases differ, the task of reconciliation is left to the Seventh Circuit.

We conclude that Grant has suffered injury within the meaning of section 1964(c).

II. Racketeering Enterprise Injury

Section 1964(c) provides that a civil remedy is available to persons suffering injury "by reason of a violation of section 1962 * * *." Yet section 1962(c) does not prohibit "racketeering activity;" rather, it makes it unlawful for a person to "conduct or participate * * * in the conduct of [an] enterprise's affairs through a pattern of racketeering activity * * *." Tiffany reasons that the language of these two sections combines to limit civil recovery to persons suffering a "racketeering enterprise injury"—*the conduct of an enterprise through* a pattern of racketeering—and does not create a cause of action for those suffering injury only from the underlying predicate acts. Tif-

---

[10] In *Sutliff*, Judge Posner made the following observation in the context of rejecting an organized crime connection for civil RICO recovery:

> Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes. We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about.

727 F.2d at 654 (citations omitted). *Sutliff* does not refer to the *Cenco* decision.

fany asserts that Grant's injuries have resulted solely from the particular acts of mail and wire fraud outlined in the complaint.

We have characterized the attempt to limit the scope of RICO by seizing on the "by reason of" language contained in section 1964(c) as a "reiterat[ion] in new guise [of] the argument that no [distinct] 'enterprise' is alleged * * *." *Bennett,* 685 F.2d at 1059 n. 5. As advanced by Tiffany here, a racketeering enterprise injury also appears to bear some resemblance to the commercial or competitive injury concept and to the requirement that RICO is applicable to only those defendants associated with organized crime. We rejected both of these restrictions in *Bennett.* 685 F.2d at 1058-59, 1063-64. We recognize that a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it. *See In Re Catanella and E.F. Hutton and Co. Sec. Litigaton,* 583 F.Supp. 1388, 1434-37 (E.D.Pa.1984) (collecting cases). "Underlying this [racketeering enterprise injury] requirement is the familiar judicial discomfort with the potential breadth of RICO's civil component." *Id.* at 1434.

We need not further consider the nature of a racketeering enterprise injury, however, for it is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury "by reason of" a RICO violation.

The Second Circuit recently held in *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984), that the "by reason of" language in section 1964(c) requires that the injury result from mobster activity or the efforts of organized crime. As indicated previously, this requirement is contrary to our holding in *Ben-*

nett.[11] We do view our decision today as consistent with the Second Circuit's decision in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984). Both require that civil RICO plaintiffs allege something more than injury from the underlying predicate acts. We recognize, however, that the Second Circuit in *Bankers Trust* defines that "something more" in a far narrower fashion. *Id.* at 517. *See also Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984) (criticizing the requirement of a racketeering enterprise injury imposed by *Sedima* and *Bankers Trust*).

Appellee Kahn asserts in the alternative that no "racketeering enterprise injury" exists because Tiffany never secured the favorable audit from Grant, and therefore its business operations were never enhanced, nor did it receive any financial advantage, from its racketeering activity. We are not persuaded by this argument. As concluded above, Grant's complaint sufficiently alleges that its injury resulted from the operation of Tiffany through a pattern of racketeering activity. Moreover, Kahn's argument would lead to the anomalous result that the racketeering activity must be allowed to proceed to successful completion before civil recovery is permitted. No interpretation of the plain language of RICO's civil provisions supports the position that Grant must silently tolerate the significant costs and risks associated with ongoing fraud before it seeks redress.

III. Amended Complaint

The district court did not articulate its reasons for refusing to allow Grant to file the amended complaint. Two factors convince us that the district court should on remand give serious consideration to Grant's motion. First, any additional allegations contained in the amended complaint would in all

---

[11] *Sedima* also holds that a prior criminal conviction is a prerequisite to civil RICO recovery. This issue has not been raised in the district court in this case.

likelihood be permitted in evidence under the original complaint. Second, the amended complaint relates Grant's claim in a far clearer and more specific manner.

In summary, we conclude that Grant has sufficiently pled that it was "injured" by Tiffany's fraudulent practices and that its injury occurred by reason of" Tiffany's alleged violation of section 1962(c).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-191 C (3)

ALEXANDER GRANT & COMPANY,
Plaintiff,

v.

TIFFANY INDUSTRIES, INC., et al.,
Defendants.

MEMORANDUM AND ORDER
(Filed Dec. 30, 1982)

This matter is before the Court on defendants' renewed motions to dismiss. The Court in its order of July 20, 1982, set out a pre-trial procedure which would be followed in this matter. In this initial stage the Court will consider only the legal issue of plaintiff's standing under the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964. Both sides have briefed this issue extensively for the Court.

Plaintiff is the former independent auditor of defendnat Tiffany Industries. In its complaint plaintiff alleges that defendants committed various fraudulent acts in an attempt to deceive plaintiff as to Tiffany's true financial condition. Plaintiff claims that the resulting deception visited upon it resulted in harm to its reputation and seeks treble damages under RICO. Defendants contend that plaintiff has no standing under RICO to bring this action and cite in support of their argument the Seventh Circuit's recent opinion in *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982). Thus the Court's ruling on defendants' motions turns upon *Cenco's* meaning and applicability to this action.

Cenco was an action involving facts very similar to those in this action. Purchasers of Cenco stock brought a class action against Cenco and its independent auditor Seidman & Seidman alleging that fraudulent practices committed by various defendants artificially inflated the value of Cenco's stock. Seidman & Seidman cross-claimed against Cenco under RICO. The court phrased the issue as a question of "the standing of auditors under the RICO statute...to sue [the audited company] for damages...." 686 F.2d at 451. The court inquired "whether a treble-damages action by auditors of criminal enterprises would contribute to the compensatory and deterrent objectives of RICO." *Id.* at 457. Pursuant to this analysis, the court held that auditors such as Seidman & Seidman have no standing under RICO to sue the audited company. In so doing the court stated:

> [i]t is presumably on behalf of owners, perhaps also the customers and competitors, of such businesses that the civil damages remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO.

Id.

In the matter *sub judice* plaintiff attempts to distinguish *Cenco* by arguing that the auditors there alleged only indirect injury while plaintiff here is alleging a direct injury. Although the matter seems to be largely a question of semantics, the holding of the Seventh Circuit is clear—auditors of companies that have been practicing fraudulent bookkeeping techniques do not have standing under RICO to sue the audited companies. The court ruled as a matter of law that auditors of fraud practicing firms do not suffer the type of injury redressable under RICO.

Plaintiff also contends that *Cenco* is in conflict with a recent Eighth Circuit decision, *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), and that the Eighth Circuit's opinion is controlling here. It is true, of course, that if the Seventh and Eighth Circuits had

issued conflicting rulings of law, this Court would be bound by the Eighth Circuit's edict. This, however, is not the situation here. In *Berg* the Court addressed two arguments raised by appellees there. First, the court resolved the issue of whether plaintiffs in that action were required to plead breach of contract to state a claim under RICO. Second, the court answered appellees' contention that plaintiffs had alleged no "injury to property," which appellees argued was a requirement of RICO. 685 F.2d at 1058. Thus, *Berg* is simply a different case than *Cenco,* which indeed, is strikingly similar to the facts in this matter.

Moreover, *Berg* is distinguishable from *Cenco* on one other ground as well. In *Berg* plaintiffs were customers of defendants and were alleging that the "life-care" they had contracted for at the subject retirement village was endangered by defendants' financial mismanagement. Contrast this with the situations in *Cenco* and here in which plaintiffs are neither "owners... customers [nor] competitors" of the alleged criminal enterprises. *Cenco,* 686 F.2d at 457. Accordingly, the Court does not believe that *Berg* in any way alters the applicability or persuasiveness of *Cenco,* and thus, defendants' motions to dismiss plaintiff's complaint will be granted.

Dismissal of plaintiff's complaint does not, however, bring this entire matter to a close. Several defendants in this action have filed counterclaims against plaintiff, and the question remains whether these are to be dismissed as well. Inasmuch as the counterclaims seem to raise primarily state law issues, the Court is most concerned with whether it has subject matter jurisdiction over the counterclaims. The Court, therefore, will ask the parties to brief the issue of whether dismissal of defendants' counterclaim is appropriate under the circumstances of this action.

In accordance with the foregoing,

IT IS HEREBY ORDERED that defendants' renewed motions to dismiss plaintiff's complaint be and are GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint be and is DISMISSED without prejudice.

IT IS FURTHER ORDERED that the parties shall within 15 days of the date of this order submit to the Court memoranda on the issue of whether defendants' counterclaim in this action should be dismissed.

Dated this 30th day of December, 1982.

/s/ Edward L. Filippine
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-0191-C(4)

ALEXANDER GRANT & COMPANY, a partnership,
Plaintiff,

vs.

TIFFANY INDUSTRIES, INC., FARRELL KAHN
and GAIL MARTIN,
Defendants.

COMPLAINT

COUNT I

JURISDICTION AND VENUE

1. Jurisdiction of this Court is founded upon the provisions of Chapter 96, U.S. Code, "Racketeer Influenced and Corrupt Organizations", Title 18, U.S. Code, Sections 1961, 1962, 1963 and 1964. Defendants were associated with an enterprise [as defined by 18 U.S.C. 1961 (4)], which enterprise was engaged in interstate or foreign commerce (or affected interstate or foreign commerce). Defendants did unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of "racketeering activity" as defined in 18 U.S.C. 1961, to the damage of plaintiffs as hereinafter alleged.

2. This civil action is brought under 18 U.S.C. 1964(c), which provides that any person injured in his business or property by reason of a violation of 18 U.S.C. 1962 may sue therefor in the U.S. District Court for threefold damages.

3. Venue in this Court is founded upon 18 U.S.C. 1965(a), in that defendants reside in the Eastern District of Missouri, or

may be found in said District, or are transacting business in said District.

4. Plaintiff Alexander Grant & Company (hereinafter "Grant") is a partnership and brings this action in its common name pursuant to Rule 17(b)(1), F.R.C.P. for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States. Grant is a public accounting firm and is engaged in the business of rendering audit and accounting services throughout the United States. In the course of rendering its services, Grant represents numerous publicly held companies which are subject to regulation and supervision by the federal Securities and Exchange Commission ("SEC").

5. Defendant Tiffany Industries, Inc. ("Tiffany") is a corporation having its principal place of business in the Eastern District of Missouri. Tiffany is a publicly held company. Unitl approximately May 1, 1978, the stock of Tiffany was traded on the American Stock Exchange.

6. Defendant Farrell Kahn ("Kahn") is a resident of St. Louis County, Missouri. At all relevant times herein alleged and until approximately May 1, 1978, Kahn was President and Chief Executive Officer ("CEO") of Tiffany. As CEO of Tiffany, Kahn directed and controlled the business of Tiffany and its operations.

7. Defendant Gail Martin ("Martin") resides in the Eastern District of Missouri. At all relevant times herein alleged, Martin was employed by Tiffany as secretary to defendant Kahn.

8. At all relevant times, the activities of defendants Kahn and Martin, and the activities of all other officers, agents and employees of Tiffany, all as described herein, were performed within their employment capacities with Tiffany and were carried out in behalf of Tiffany.

9. Under the provisions of SEC regulations, public companies, including Tiffany, are required to retain independent

public accountants to audit their books and certify to their financial statements. SEC regulations further require filings by Tiffany and other public companies of independently audited financial statements, and the SEC and the investing public rely upon the accuracy and reasonableness of said financial statements. For several years prior to 1978 and until approximately May 22, 1978, Grant was retained by Tiffany to render accounting and auditing services. Tiffany's fiscal year ends on December 31. Among the services rendered by Grant to Tiffany was the conduct of annual audits of Tiffany's books and records. The results of audits conducted by Grant were incorporated by Tiffany into its annual reports to stockholders and were also included in reports made by Tiffany to the SEC as required by federal securities laws.

10. Tiffany has, from time to time, borrowed substantial sums from various lenders. Upon information, in July of 1977, Tiffany sought and obtained additional loans upon representations by Tiffany to its lenders that Tiffany's financial position was sound and that Tiffany was enjoying positive earnings and thus was a good credit risk to said lenders.

11. Defendant Tiffany is and was at all relevant times a "person" as defined in 18 U.S.C. Sec. 1961(3). Tiffany sells its products in interstate and foreign commerce. Defendants Kahn and Martin were at all relevant times "persons" employed by Tiffany. Defendants were at all relevant times associated with an "enterprise" as defined in 18 U.S.C. Sec. 1961(3) engaged in or the activities of which affect interstate and foreign commerce, specifically, Tiffany and its business operations and affairs.

12. Sometime prior to June 30, 1977, the exact time presently unknown to plaintiffs, defendant Kahn and other officers and employees of Tiffany devised a scheme or artiface to defraud Grant and others. Defendant Kahn and other officers and employees of Tiffany became aware that Tiffany's actual financial position was unsound and that if "generally accepted ac-

counting principles" ("GAAP") were applied, Tiffany was incurring losses rather than earnings. Tiffany misrepresented its true financial position to its lenders in order to obtain financing. Grant was not retained by Tiffany to conduct "interim" audits on Tiffany's books and records during the year. Accordingly, during the year Tiffany was able to record certain sales (as hereinafter described) and to make other entries to its books during the year without any check by independent auditors. Tiffany "closed" its 1977 books and sought to show earnings for the fiscal year ending December 31, 1977. After adjustments proposed by Tiffany, Defendant Kahn and other officers and employees of Tiffany knew that if the actual financial facts (applying GAAP) concerning its 1977 performance were discovered, Tiffany would have sustained a substantial loss for the year instead of a profitable year as shown on Tiffany's books.

13. Defendants sought to induce Grant into assisting, aiding and abetting Tiffany in making false, misleading and fraudulent financial statements. Defendant Kahn and other officers and employees of Tiffany gave Grant false, misleading and fraudulent information, intending that Grant accept such false, misleading and fraudulent information and permit Tiffany to include such information in Tiffany's financial statements. Defendants further sought to induce Grant to restrict the scope of its audit investigations by complaining that the scope was excessive and by withholding payment of amounts due and theretofore promised to Grant for services performed by Grant during the course of the audit. Defendants further sought to induce Grant to "certify" its audit and financial statements to the SEC and to stockholders, thus lending Grant's reputation and credibility as independent auditors to such false and fraudulent financial statements.

14. Having devised the scheme to defraud as heretofore alleged, defendants conducted or participated, directly or indirectly, in the conduct of Tiffany's affairs through a pattern of

racketeering activity as defined in 18 U.S.C. Sec. 1961(5) in the following particulars:

(a) In late February or early March, 1978, defendant Kahn, in furtherance of said scheme to defraud, called (on the telephone) one Murphy, who is President of Steelabrade Corporation ("Steelabrade"), a supplier of products to Tiffany. Kahn, with full knowledge that as of December 31, 1977 and early March, 1978 Steelabrade held no Tiffany "inventory" in its possession, nevertheless, fraudulently and willfully attempted to induce Murphy to represent to Grant that Steelabrade did, in fact, have in its possession as of December 31, 1977 and early March, 1978 certain inventory purportedly the property of Tiffany. Murphy refused Kahn's fraudulent request, whereupon Kahn directed Murphy to prepare and deliver to Kahn a schedule of all purchases during 1977 of Steelabrade products by Tiffany. Murphy complied.

(b) Kahn falsely and fraudulently represented to Grant that Steelabrade held in its possession (as of December 31, 1977 and early March, 1978) approximately $500,000 in "inventory" (products sold by Steelabrade to Tiffany and other products, all of which were held in Steelabrade's possession). In reliance upon said representations, Grant caused to be sent to Steelabrade a "confirmation" request, that is, a written request that Steelabrade confirm to Grant that Steelabrade did, in fact, have in its possession said inventory. A copy of said confirmation request is attached as Exhibit A and incorporated herein.

(c) On or about March 8, 1978, Kahn and Martin (at Kahn's direction) prepared a schedule showing sales by Steelabrade to Tiffany during 1977 and additional products. The total of said sales and other property was valued at approximately $500,000. To said schedule said defendants attached a confirmation request. Defendant Kahn, or defendant Martin, or some third person (acting at the direction of Kahn or Martin) signed the name "James V. Murphy" (President of Steelabrade) to said document and dated the same. Said signature was made

without the knowledge, consent or authorization of Murphy, and is a forgery. Further, defendant Kahn, or defendant Martin (at Kahn's direction) inserted the following typed language in the confirmation request:

> "Attached please find a list of materials that was either purchased from us going back to 1976 or was delivered to our facility for processing during 1977. This inventory was at our premises at December 31, 1977 and March 1, 1978."

The insertion of said language was done without the knowledge, consent or authorization of Murphy, and is a false statement. A copy of the fictitious and fraudulent confirmation, together with the schedule, is attached as Exhibit B and is incorporated herein.

(d) Defendants committed the acts herein alleged as part of a scheme to defraud Grant, in that Defendants by means of false representations and forgery, intended to induce Grant to believe that Tiffany owned some $500,000 in inventory in the possession of Steelabrade. Defendants further attempted to induce Grant to make a certified audit which would reflect ownership by Tiffany of said inventory. Such certification would have materially increased Tiffany's earnings (or decreased its losses) for 1977, and would have distorted Tiffany's actual financial condition as of December 31, 1977.

(e) On or about March 8, 1978, defendants, having devised and intending to devise a scheme or artifice to defraud (as heretofore alleged) by means of false or fraudulent representations, and for the purpose of executing such scheme or artifice or attempting so to do, placed in a post office or authorized depository for mail, to be sent or delivered by the U. S. Post Office Department, the fictitious, fraudulent and forged confirmation (Exhibit B), addressed to Grant at its offices in Clayton, Missouri. Such actions of defendants are in violation of Title 18, United States Code, Section 1341 (Mail Fraud). Further, such actions constitute a part of a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962.

(f) On or about March 8, 1978, defendants, having devised and intending to devise a scheme or artifice to defraud (as heretofore alleged) by means of false or fraudulent representations, and for the purpose of executing such scheme or artifice or attempting so to do, placed in a post office or authorized depository for mail, to be sent or delivered by the U. S. Post Office Department, a copy of the fictitious, fraudulent and forged confirmation (Exhibit B-1 attached hereto and incorporated herein), addressed to James V. Murphy at Steelabrade at its offices in St. Louis County, Missouri. Such actions of defendants as alleged herein are a separate and additional violation of Title 18, United States Code, Section 1341 (Mail Fraud). Further, such actions constitute a part of a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962.

15. In June, 1977, shortly prior to obtaining loans as described in paragraph 10, Tiffany recorded on its books a purported sale to the Government of Nigeria (hereinafter the "Nigerian sale") in the approximate amount of $3,500,000. The effect of Tiffany's recordation of such purported sale was to increase substantially Tiffany's net income for 1977 (or to decrease losses substantially). The recordation of such sale by Tiffany was effected unilaterally, that is, without audit by Grant.

16. In late December, 1977 when Grant personnel commenced work on the audit of Tiffany's books for 1977, the purported Nigerian sale was brought to Grant's attention. Grant discovered that most of the products allegedly "sold" by Tiffany in 1977 to the Government of Nigeria had not, in fact, been shipped by Tiffany to the Customer. Additionally, Grant's investigation revealed that a substantial portion of the products allegedly "sold" by Tiffany in 1977 were products Tiffany was to purchase from suppliers, and most of said products had not even been purchased by Tiffany for delivery to the Government of Nigeria.

17. As the result of discoveries by Grant as alleged in paragraph 16, serious and substantial questions arose as to

whether, in accord with GAAP, Tiffany had properly recorded the Nigerian sale, and whether Tiffany had the right to reflect in its financial statements the substantial earnings (or reduction in losses) which would result from such a sale. Grant personnel communicated to defendant Kahn and to other Tiffany personnel their serious doubts as to the validity of the purported "sale". Tiffany personnel and representatives of Tiffany aggressively sought to persuade Grant to "sign off" on said sale, that is, to certify that said purported "sale" was indeed a sale in accord with GAAP.

18. Between January and May, 1978, defendants conducted or participated, directly or indirectly, in the conduct of Tiffany's affairs through a pattern of racketeering activities in that they committed acts in violation of 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1343 (wire fraud) as part of a fraudulent scheme or artifice to deceive Grant and to induce Grant to certify the purported Nigerian sale as a sale in accord with generally accepted accounting principles. More specifically:

(a) In early 1978, Tiffany personnel represented to Grant personnel that the Nigerian sale should be recognized as a sale for various reasons, including Tiffany's representation that while the products "sold" had not yet been delivered, nevertheless Tiffany had issued purchase orders in June 1977 (before the Nigerian sale was recorded by Tiffany) to various suppliers, and that the suppliers were "holding" the products as early as June, 1977, awaiting only shipment instructions from Tiffany. Tiffany personnel urged Grant personnel to consider such products as "sold" since Tiffany was obligated to pay the suppliers for such products (by virtue of the purchase orders), and the products were ready for shipment.

(b) In response to the representations by Tiffany as described in subparagraph (a), Grant personnel requested of Tiffany confirmation from each supplier as to the following: (1) the issuance by Tiffany of purchase orders to the various suppliers

prior to June 30, 1977 (the date the Nigerian sale was recorded); (2) the fact that the products so ordered were in fact being held for Tiffany by the suppliers prior to June 30, 1977.

(c) The representations made by Tiffany as described in subparagraph (a) were false and fraudulent and known to be so when made. Tiffany had not, in fact, issued such purchase orders prior to June 30, 1977 as represented, nor were said products being held (per any such purchase orders) by said suppliers awaiting orders for shipment.

. (d) Having devised a scheme or artifice to defraud, as heretofore alleged, Tiffany caused to be placed in a post office or authorized depository for mail matter, to be delivered by the U.S. Post Office Department, and thereafter received a letter dated February 20, 1978 from Hunter Manufacturing, Inc. to Tiffany (Exhibit C attached and incorporated herein). Tiffany caused said letter to be mailed and received said letter for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false and fraudulent financial statements which would distort Tiffany's actual earnings or losses. The aforesaid acts by Tiffany are in violation of 18 U.S.C. 1341 (mail fraud) and are part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs.

(e) Tiffany committed nine additional and separate violations of 18 U.S.C. 1341 (mail fraud) by causing nine letters to be sent by other suppliers to Tiffany. None of the suppliers, including Hunter Manufacturing, Inc., were aware of Tiffany's true purpose and intent. As to each such letter, Grant restates the allegations contained in subparagraph (d) hereof. Each such violation constitutes part of a pattern of racketeering activity by Tiffany in the conduct of its affairs. Said letters are marked Exhibits D, E, F, G, H, I, J, K and L, and are further described as follows:

Exhibit D: Letter of Merritt Roaster Corp. dated 2/2/78 to Tiffany

Exhibit E: Letter to Hagan Manufacturing Company dated 2/17/78 to Tiffany

Exhibit F: Letter of the Essmueller Company dated 2/21/78 to Tiffany

Exbibit G: Letter of Seedburo International Equipment Co. dated 2/21/78 to Tiffany

Exhibit H: Letter of Ferrell-Ross dated 2/20/78 to Tiffany

Exhibit I: Letter of Gustafson, Incorporated dated 2/17/78

Exhibit J: Letter of Universal Industries dated 2/17/78

Exhibit K: Letter of Howe Richardson Scale Company dated 2/20/78 to Tiffany

Exhibit L: Letter of Superior Equipment Manufacturing Co. dated 2/21/78 to Tiffany

(f) Copies of the ten letters (Exhibits C through L) were delivered by Tiffany employees to Grant personnel in early 1978. Grant personnel advised Tiffany that Grant wished to "reconfirm" the representations of the suppliers by having Tiffany address an additional letter to some of the suppliers. Grant wished to ask a representative group of the suppliers whether the purported Purchase Order to each supplier was, indeed, received by the supplier prior to June 30, 1977, and whether the material supposedly ordered by the Purchase Order had, indeed, been held for Tiffany's account and continued to be so held. A draft of such a confirmation letter was prepared. On or about March 13, 1978, Defendant Kahn, knowing that the representations in said letter (if signed and returned by the suppliers) were false, and intending to defraud and mislead Grant,

caused six (6) letters (Exhibits M through R attached and incorporated herein) to suppliers to be typed on Tiffany letterhead. Defendant Kahn and other Tiffany personnel acting on behalf of Tiffany, having devised a scheme or artifice to defraud, caused to be placed in a post office or authorized depository for mail matter, to be delivered by the U.S. Post Office Department, said six letters (Exhibits M through R). Each such letter contained false and fraudulant statements, and said letters were placed in the mail, addressed to the suppliers as addressees, with the intent by Tiffany to induce each addressee to sign such letter and return the same to Grant and thus to aid and assist Tiffany in defrauding Grant. Tiffany caused said letters to be mailed for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false, fraudulent and misleading financial statements which would distort Tiffany's actual earnings or losses.

(g) Each of the six mailings (Exhibits M through R) wherein Tiffany caused a confirmation to be mailed, is a separate and additional violation of 18 USC 1341 (mail fraud) and each such violation is a part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs.

(h) Upon information and belief, Grant alleges that after the six letters (Exhibits M through R) described in sub-paragraphs (f) and (g) were received by the various suppliers, one or more of said suppliers communicated to Tiffany a refusal or reluctance to sign and return the confirmation letter, since at least portions of the statements each supplier was asked to "confirm" was false. At various times (the specific instances presently unknown to Grant) officers and employees of Tiffany, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted by means of wire (telephone) in interstate commerce messages regarding said letters (Exhibits M

through R) and fraudulent requests that one or more of said suppliers sign and return said confirmations. Each such telephone or other wire communication is a separate violation of 18 USC 1343 (wire fraud).

(i) Having devised a scheme or artifice to defraud (as heretofore described), and for the purpose of executing such scheme or artifice, officers and agents of Tiffany induced the suppliers identified in Exhibits M to R to sign said letters and further caused said letters to be addressed to Grant and to be placed in a post office or authorized depository or mail matter, to be delivered by the U.S. Post Office Department. Each of the six instances aforesaid, wherein Tiffany caused said letters to be mailed to Grant, is a separate and additional violation of 18 U.S.C. 1341 (mail fraud) and each such violation is a part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs. Tiffany caused said confirmations to be mailed to Grant for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false and fraudulent financial statements which would distort Tiffany's actual earnings and losses.

(j) In early 1978, questions were raised by Grant as to whether the Government of Nigeria (the alleged purchaser, sometimes referred to as the "Bendel food Production Board") had made arrangements so as to provide Tiffany sufficient assurance that amounts due Tiffany under the purported Nigerian sale would be paid. Defendant Kahn and other Tiffany officers and employees represented to Grant that "financing" had been arranged, and that a consortium of banks in Nigeria had made commitments to loan the Purchaser sufficient funds to make full payment to Tiffany for products sold under the Nigerian sale. As purported proof of said financing commitments, defendant Kahn, acting in behalf of defendant Tiffany, delivered to Grant the following documents (marked as follows and incorporated herein):

Exhibit S: Letter dated 3/9/78 to Tiffany, from W. J. Anukpe, Chairman/Managing Director, New Nigeria Bank Ltd. (the "Anukpe letter").

Exhibit T: Letter dated 3/20/78 to Tiffany, from M. Insole, Principal Manager, Standard Bank Nigeria Limited (the "Insole letter").

Defendant Kahn represented to Grant that Exhibits S and T had been received by Tiffany from the Nigerian banks designated in said exhibits, and further represented that by virtue of said letters and other assurances given Kahn by the banks and by the Purchaser, payment in full under the Nigerian sale was assured.

(k) The representations made by defendant Kahn and by other Tiffany employees as described in subparagraph (j) were false and fraudulent and known to be so when made:

(1) The Anukpe letter, Exh. S, is a forgery, the purported signature having been forged by defendant Kahn or some other Tiffany officer or employee acting in Tiffany's behalf.

(2) The Anukpe letter, Exh. S, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices in St. Louis County, Missouri by defendant Martin or some other Tiffany officer or employee acting in Tiffany's behalf.

(3) The Insole letter, Exh. T, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices on the same Tiffany typewriter used to type the forged Anukpe letter.

(4) Upon information and belief, Grant alleges that the Insole letter is a forgery.

(l) Upon information and belief, Grant further alleges:

(1) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or

others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, placed (or caused to be placed) in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, one or both of the fictitious, spurious and fraudulent documents (Exhs. S and T); in violation of 18 U.S.C. 1341 (mail fraud).

(2) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted by means of wire (telephone) and by telex in interstate or foreign commerce the contents or substance of the contents of Exhs. S and T, in violation of 18 U.S.C. 1943 (wire fraud).

(m) In a false and fraudulent attempt to "pressure" Grant into certifying the Nigerian sale as a sale, Tiffany engaged the services of four independent public accounting firms and furnished to said firms the fictitious, spurious and fraudulent documents (Exhs. S and T) and other false, misleading and fraudulent materials. Tiffany intended, by such fraudulent actions, to persuade said accounting firms to render opinions to the effect that the Nigerian sale should be recognized, and thus to coerce Grant to render such opinion. Based upon the false representations made to said firms, they did indeed render such opinions. Upon information and belief, Grant further alleges:

(1) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore alleged), and for

the purpose of executing such scheme or artifice, placed or caused to be placed in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, and transmitted by wire or telex in interstate or foreign commerce, false and fraudulent communications to said accounting firms and to others, in violation of 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1943 (wire fraud).

19. Throughout the course of the audit by Grant of Tiffany's books and records for 1977, Tiffany officers, agents and employees (or others acting in Tiffany's behalf) impeded and obstructed the ordinary course of the audit and engaged in a conspiracy to conceal relevant facts from Grant and to defraud and mislead Grant. As the result of such conspiratorial and fraudulent conduct, the time required by Grant personnel to conduct the audit was substantially enlarged over the time which would have been required had Tiffany not engaged in such conduct. Tiffany was well aware that the charges by Grant to Tiffany for audit services would be based upon the time spent by Grant personnel. In further perpetration of this fraudulent and criminal conspiracy, Tiffany attempted to induce Grant to complete its audit and certify Tiffany's fraudulent transactions first by withholding payment; then, when the fraudulent and criminal conduct was disclosed, Tiffany sought to conceal said conduct by promising to pay Grant in full.

20. Had Grant been aware of the activities of defendants as above alleged, it would not have performed any accounting services for Tiffany in connection with the 1977 audit. As a result of the fraudulent conduct of defendants as described above, none of which was known or disclosed to Grant, the personnel of Grant continued to perform accounting services for defendant, all to Grant's injury to its business and property.

21. Through late April, 1978, defendants attempted to conceal (and are continuing to conceal) their fraudulent and unlawful acts. In late April, 1978 when Grant confirmed that

defendants had used forged and fictitious documents in an attempt to defraud Grant and in a further attempt to publish misleading and fraudulent financial reports, Grant promptly advised Tiffany and its counsel that Grant would report its findings to the SEC as required by SEC Regulations. Following said report, the SEC commenced an intensive investigation of Tiffany; said investigation is still pending. Following Grant's report to the SEC, Tiffany terminated Grant and refused to pay Grant for its services.

22. As the result of the SEC investigation, which was necessitated by and resulted directly from the unlawful and fraudulent actions of defendants, Grant has incurred substantial expense in responding to SEC subpoenas and requests for documents, interviews, the giving of testimony, counsel fees related to same, and other related expenses.

23. As a further result of the unlawful and fraudulent actions of defendants and their continued effort to conceal such actions, Grant has been damaged in its reputation as a national independent public accounting firm. Defendant Tiffany has issued misleading public statements to the effect that Tiffany's problems do not involve violations of law but instead are little more than "disputes" with its former auditors (Grant).

24. In furtherance of its fraudulent and unlawful actions, Tiffany (beginning in early May, 1978) promised to pay Grant all fees owed (totaling $258,000), whereas Tiffany intended not to pay Grant at all, but to induce Grant to limit its responses to the SEC and to lend its reputation to representations made to the SEC by Defendants.

25. As the result of the foregoing, Grant has been damaged in the sum of $1,500,000.

WHEREFORE, plaintiffs (Grant) prays judgment against defendants under Count I in the sum of $1,500,000; further, in accord with 18 U.S.C. 1964(c), that said award of damages be

trebled, and that plaintiffs further recover the costs of this action and reasonable attorney's fees.

Walter M. Clark

and

Thomas E. Wack

Attorneys for Plaintiff
611 Olive St., Suite 1950
St. Louis, Missouri 63101
314-621-5070

OF COUNSEL:
ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

APPENDIX E

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

18 U.S.C. §§1961-1968

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor

organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the fellonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or policial subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usary, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involed in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter.

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdic-

tion to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities

of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it has shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigation demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproducing; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the Untied States in aid of a grand jury investigation of such alleged racketeering violations.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such persons, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as a racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof

made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such

person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter each order or orders as may be required to carry into effect the provisions of this section.

APPENDIX F

Petitioner's Subsidiary and Affiliated Companies

Tiffany Industries, Inc. is the parent company of the following wholly-owned subsidiary corporations:

Centralia Container Corp., d/b/a "Concen Corp."

Modulo 3 Inc.

Tiffany Industries Americus Corp.

Tiffany Industries Americas, S.A., Inc.
(a wholly-owned subsidiary of Tiffany Americus Corp.)

Tiffany Industries Americas, C.A., Inc.
(a wholly-owned subsidiary of Tiffany Americus Corp.)

Tiffany Industries Americus, Ltd.
(a wholly-owned subsidiary of Tiffany Industries Americas, C.A., Inc.)

TRULOCK Machinery Fair, Inc.

TRULOCK Southern, Inc.

Vuetech Corp.

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-779
No. 85-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WALTER M. CLARK
(Counsel of Record)
CATHERINE D. PERRY
GLENN E. DAVIS
ARMSTRONG, TEASDALE, KRAMER
& VAUGHAN
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, an accountant cannot sue its former client under RICO when the client and others have conducted the affairs of an enterprise through a pervasive scheme of "organized criminal activity" (a pattern of mail and wire fraud) and the accountant is injured by reason of that conduct.

2. Whether, as a matter of law, there is any inconsistency, raised below and preserved for review, between the Eighth Circuit's ultimate disposition of Petitioners' standing motions and the Supreme Court's discussion of civil RICO standing requirements under 18 U.S.C. §1964(c) in *Sedima* or *Haroco*.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	2
Statement of Facts	3
Reasons Why the Writ Should Be Denied	6
I. There Is No Conflict Between The Decision Below and *Sedima* or *Haroco* on Any Issues Preserved for Review	7
II. There Is No Conflict Between The Decision Below and *Sedima* or *Haroco* With Respect To The Pattern Of Racketeering Requirement	8
III. Petitioners' "Proximate Cause" and "Infusion of Income" Arguments are Frivolous In The Circumstances Of This Case, And There Is No Conflict With The Seventh Circuit	13
Conclusion	18
Appendix:	
A. Amended Complaint (without exhibits)	A-1
B. Pending Legislation	B-1
S. 1521	B-1
H.R. 2517	B-2
H.R. 2943	B-6

TABLE OF AUTHORITIES

Page

Cases:

Alexander Grant & Company v. Tiffany Industries, Inc., 563 F.Supp. 35 (E.D.Mo. 1983) 2

Alexander Grant & Company v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir. 1984), *vacated & remanded,* 105 S.Ct. 3550 & 3551 (1985) ..... *passim*

Alexander Grant & Company v. Tiffany Industries, Inc., 770 F.2d 717 (8th Cir. 1985) ..... *passim*

American National Bank v. Haroco, Inc., 473 U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985) ..... *passim*

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) *aff'd in part rev'd in part,* 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied,* ____ U.S. ____ (1983)..... 14

Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir.), *cert. denied,* 459 U.S. 880 (1982)..... 7, 16-18

Haroco, Inc. v. American National Bank, 747 F.2d 384 (7th Cir. 1984) *affirmed* 473 U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985) 13, 17, 18

Iannelli v. United States, 420 U.S. 770 (1975) 11

Illinois Department of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985) 18

Noland v. Gurley, 566 F.Supp. 210 (D.Col. 1983)..... 10

R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) 11

Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied,* ____ U.S. ____ (1983) 17, 18

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. ___, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) ..... *passim*

Sutliff, Inc. v. Donovan Companies, 727 F.2d 648 (7th Cir. 1984) 17

United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) 11

United States v. Bajaric, 706 F.2d 42 (2d Cir. 1983) 15

United States v. Beatty, 587 F.Supp. 1325 (E.D.N.Y. 1984) 10

United States v. Cariello, 536 F.Supp. 698 (D.N.J. 1982) 15

United States v. Gibson, 486 F.Supp. 1230 (S.D.Oh. 1980) 11

United States v. Ivic, 700 F.2d 51, 65 (2d Cir. 1983) 15

United States v. LeRoy, 687 F.2d 610 (2d Cir. 1982) 12

United States v. Martino, 648 F.2d 367 (5th Cir. 1981) .. 12

United States v. McNary, 620 F.2d 621 (7th Cir. 1980) .. 15

United States v. Moeller, 402 F.Supp. 49 (D.Conn. 1975) 10

United States v. Parness, 503 F.2d 930 (2d Cir. 1974) *cert. denied,* 419 U.S. 1105 (1975) 10

United States v. Salvitti, 451 F.Supp. 195 (E.D.Pa. 1978) 11

United States v. Turkette, 452 U.S. 576 (1981) 12

United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) 10

Statutes:

18 U.S.C. §1961(5) 9

18 U.S.C. §1962(a) 15

18 U.S.C. §1962(c) 5, 10, 11, 13, 15

18 U.S.C. §1964(c) 2

18 U.S.C. §3575(e) 11

No. 85-779
No. 85-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Alexander Grant & Company, hereby opposes the writs of certiorari requested by Petitioners Tiffany Industries, Inc. and Farrell Kahn. Respondent files this Brief as its opposition to both Petition No. 85-779 and Petition No. 85-780.

STATEMENT OF THE CASE

On August 22, 1984, the United States Court of Appeals for the Eighth Circuit reversed the decision of the District Court,[1] and held that Respondent Alexander Grant & Company ("Alexander Grant") had alleged an injury within the meaning of 18 U.S.C. § 1964(c) against its former client, Tiffany Industries, Inc. ("Tiffany"), Tiffany's president, Farrell Kahn ("Kahn"), and one of Tiffany's employees. In reversing the District Court, the Court of Appeals limited its decision to asserted standing barriers and, considering both the original complaint and a proposed amended complaint,[2] held that Alexander Grant had standing to sue and satisfied any possible RICO injury requirement. *See Alexander Grant & Company v. Tiffany Industries, Inc.*, 742 F.2d 408, 413-14 (8th Cir. 1984) (*Grant I*). The Eighth Circuit denied motions to stay the mandate, and the case is proceeding below with related cases scheduled for trial as soon as February 3, 1986.

On July 2, 1985, this Court vacated the Eighth Circuit's *Grant I* decision and remanded for "further consideration in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. ____ (1985), and *American National Bank v. Haroco, Inc.*, 473 U.S. ____ (1985)." 105 S.Ct. 3550 and 3551. On remand, the Eighth Circuit readopted the portions of *Grant I* which did not conflict with *Sedima*. *Alexander Grant & Company v. Tiffany Industries, Inc.*, 770 F.2d 717, 718 (8th Cir. 1985) (*Grant II*). Recognizing, however, that this Court made plain that no "racketeering injury" is required, the Eighth Circuit eliminated from its holding any racketeering enterprise injury requirement. The Court also held that the Complaint contained allegations of causation sufficient to withstand a motion to dismiss a com-

[1] *Alexander Grant & Company v. Tiffany Industries, Inc.*, 563 F.Supp. 35 (E.D. Mo. 1983).

[2] The District Court granted Alexander Grant leave to file its Amended Complaint on April 5, 1985.

plaint. *Grant II*, 770 F.2d at 719. Finally, the Court observed that Petitioners' argument on remand — that Alexander Grant had not alleged a "pattern of racketeering activity" — had never been raised before and therefore did not need to be considered on remand. 770 F.2d at 718, n.1. The Eighth Circuit, however, added that the "number and nature of the acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient continuity plus relationship to satisfy the Supreme Court's concerns in Sedima that RICO not be extended to reach sporadic activity." *Id.*

Tiffany and Kahn's petitions for writs of certiorari are thinly disguised efforts to impede, delay, and fragment the orderly progression of this litigation to trial. They raise no colorable inconsistency between the Eighth Circuit's decision in *Grant II* and *Sedima* or *Haroco* with respect to standing under RICO, instead relying upon arguments beyond the scope of both their original motion to dismiss and the Eighth Circuit's analysis thereof.

STATEMENT OF FACTS

Alexander Grant & Company ("Alexander Grant") is an accounting partnership with offices and partners nationwide. From 1970 until mid-1978 Alexander Grant was the outside auditor for Tiffany Industries, Inc. ("Tiffany"), a publicly-traded company. In 1978, during the course of the December 31, 1977 fiscal year audit of Tiffany's financial statements, Alexander Grant discovered that it was the target of a massive criminal scheme of Tiffany and certain of its officers, directors, and employees. The purpose of the fraudulent plan, as alleged in both the Complaint and the Amended Complaint, was to obtain Alexander Grant's unqualified audit opinion, thereby concealing Tiffany's true financial condition with the shroud of fraudulent financial statements, in order to defraud Tiffany's shareholders and lenders.

Tiffany and its top officers engaged in innumerable acts of racketeering activity to defraud Alexander Grant as part of its larger and concurrent scheme to defraud Tiffany's shareholders and lenders. In order to deceive Alexander Grant, forgery became standard practice. When documents were required for an auditor to verify transactions (e.g., the recording of sales or earnings from sales) and the documents did not exist, Tiffany's officers and employees simply created them. Photocopies of false and forged documents were presented to Alexander Grant during the course of the audit, purporting to evidence material transactions. The original Complaint alleged thirty acts of mail fraud and wire fraud. The Amended Complaint, with the benefit of initial discovery and further investigation, disclosed fifty-eight such acts. These instances of racketeering activity, moreover, are exclusive of the multiple acts of mail fraud committed through mass mailings to shareholders and others.

The Amended Complaint alleges multiple schemes within the principal scheme. Forged and false letters from equipment suppliers and from Nigerian banks were mailed to convince Alexander Grant to accept recognition of revenue from a sale to a Nigerian state government. Inventory values were inflated. Forged and false letters of intent to purchase assets were mailed. All of this was done to convince Alexander Grant to lend its name and reputation to Tiffany's grossly inflated and misleading financials.

Tiffany ultimately failed to achieve all of its goals. After months of audit work, Alexander Grant discovered and forced disclosure of the fraud. By that time, Alexander Grant had expended great amounts of resources and professional labor on the audit, yet was never compensated for its services. The fraud induced Alexander Grant to continue the engagement much longer than it otherwise would have. Its name was associated with Tiffany's flagging fortunes, diminished reputation, and lack of credibility. Alexander Grant's reputation in the business community was severely damaged.

Even after Alexander Grant's discovery and disclosure of the fraud, however, the scheme continued, through promises, later broken, of a full investigation and disclosure of the results, and promises, later broken, of payment for services rendered. The continuing fraud increased Alexander Grant's damages, through expenses of an SEC investigation and further injury to its business and professional reputation. Ultimately, Tiffany fired Alexander Grant but never paid the owed accounting fees.

Tiffany profited from its criminal scheme to defraud.[3] Tiffany was in default to all of its lenders prior to Alexander Grant's discovery of the fraud in connection with the 1977 audit. The fraud prevented disclosure of these defaults and enabled Tiffany to stay in business and generate revenues as a direct consequence of the fraud. Moreover, by misrepresenting its financial condition to lenders in June of 1977, Tiffany was able to borrow eleven million dollars in return for promissory notes made out to a third party. Thereafter, forged documents purportedly justifying the June entries in Tiffany's books were provided to Alexander Grant. The infusion of substantial sums into Tiffany could not have been accomplished without the related fraud of Tiffany and its officers directed at Alexander Grant in connection with the year-end 1977 audit.

This lawsuit, along with other litigation brought by Tiffany's shareholders, lenders, and insurers, ensued. The SEC sued Tiffany and several of its top officers and directors, and they signed consent decrees. *S.E.C. v. Tiffany Industries, Inc., et al.*, No. 81-1106-C-2 (E.D. Mo. April 23, 1982). The private litigation was consolidated and is now in the course of discovery below. Discovery will be completed on December 9, 1985. This lawsuit, the first filed, was previously severed from the consolidated cases and, at least until the filing of the petitions for *certiorari* herein, was moving toward trial.

---

[3] Of course, "infusion of income" into an enterprise is not a substantive element of an 18 U.S.C. § 1962(c) RICO claim. *See* the discussion at pp. 14-16, *infra*.

REASONS WHY THE WRIT SHOULD BE DENIED

If Petitioners were candid, they would acknowledge that the only conceivable inconsistency between the Eighth Circuit's *Grant I* opinion and *Sedima* with respect to standing, or the "racketeering enterprise injury" issue, was that the Eighth Circuit required *too much* of Alexander Grant's pleading by acknowledging that such an amorphous requirement might exist. In *Grant II,* the Eighth Circuit foreclosed any reasonable argument on this issue, *the only issue it faced on remand,* by faithfully following *Sedima.* The District Court did not hold, and neither Tiffany nor Kahn argued below, that Alexander Grant failed to plead facts supporting a substantive violation of section 1962(c).

In declining to limit the plain language of RICO in *Sedima,* this Court recognized that any defects due to the statute's breadth were to be addressed by Congress, not by the judiciary, because any such defects were "inherent in the statute as written." *Sedima,* 473 U.S. at ____, 105 S.Ct. at 3287, 87 L.Ed.2d at 361. Congress has heeded this Court's invitation. Three bills are now pending in Congress to limit the scope of civil RICO. S. 1521, 99th Cong. 1st Sess.; H.R. 2517, 99th Cong. 1st Sess.; H.R. 2943, 99th Cong. 1st Sess. *See* Appendix B. Not satisfied with Congressional action, Petitioners now seek to have this Court decide another RICO case not six months after *Sedima* to bring RICO "back within 'the original conception of its enactors' ". (Kahn Pet. at 10.)

In making this request, Petitioners point to no new conflicts in the Circuits. They merely argue that the Eighth Circuit's decision on remand is contrary to this Court's decision in *Sedima,* in large part based on an argument that was never raised below but is premised on this Court's reference to the "pattern of racketeering" requirement in a footnote in *Sedima.* They further implore this Court to reach out and hold, on the barren record before it, that no pattern exists, and to utilize this case to correct "the misuse of civil RICO." There is no conflict between the decision of the Eighth Circuit and any decision of

this Court, and *certiorari* is certainly not again warranted to review denial of Petitioners' motion to dismiss.

I.

There Is No Conflict Between The Decision Below And *Sedima* Or *Haroco* On Any Issues Preserved For Review.

On remand from this Court, the Eighth Circuit held:

> Point II of our earlier opinion in *Grant*, 742 F.2d at 413-14, is contrary to *Sedima* in that we accepted that some type of "racketeering enterprise injury" was necessary but declined to further define the nature of such an injury because we found it "clear that Grant's complaint does not simply allege injury from the underlying predicate acts." 742 F.2d at 413. Accordingly, that discussion and holding essentially have been overruled. Since, however, our error was in requiring that Grant allege *more* than the Supreme Court has now said a plaintiff must allege in order to state a civil RICO claim, we believe our ultimate directive was the proper one: Grant is entitled to pursue its allegations on the merits.

Grant II, 770 F.2d at 718 (Emphasis in original). The Eighth Circuit additionally found no conflict between *Sedima* or *Haroco* and the remainder of its first opinion, which had rejected *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) as a basis for denying Alexander Grant standing.[4]

Confronted with the Eighth Circuit's *Grant II* opinion, which is entirely consonant with the letter and spirit of *Sedima*, Tiffany and Kahn focus on arguments, addressed below, which they never presented to the District Court or properly raised to

---

[4] The Eighth Circuit distinguished *Cenco* and rejected any "commercial" or "competitive" injury restriction, any "direct-indirect" injury limitations, or any other standing requirements premised on generalized references to the legislative history or purposes of RICO. *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411-12 (8th Cir. 1984).

the Eighth Circuit below. For example, the pattern argument, so vigorously asserted by Petitioners, is plainly not preserved for review in this Court. The Eighth Circuit specifically observed that any pattern issue was not properly preserved for review because it had never been raised in the District Court and was not raised until remand. *Grant II,* 770 F.2d at 718, n.1. The pattern argument could be rejected on this ground alone. This Court does not resolve issues not timely raised by parties. *Sedima* did not reach the pattern issue because it was not raised below. 473 U.S. at ____, 105 S.Ct. at 3287, 87 L.Ed.2d at 361. Further, not only is the pattern issue not properly preserved for review in this case, Petitioners have not identified any conflict warranting review. Indeed, given the short period of time since footnote fourteen of *Sedima* was advanced, it is difficult to perceive how any issue worthy of *certiorari* could so quickly evolve.

The only reference in *Sedima* to *Grant I* that reflects an inconsistency between *Sedima* and *Grant I* appears in footnote six. In that footnote, this Court observed that the Eighth Circuit considered its opinion "contrary to *Sedima* but consistent with, though broader than, *Bankers Trust*" and "held that a RICO claim does require some unspecified element beyond the injury flowing directly from the predicate acts." 473 U.S. at ____, 105 S.Ct. at 3280, 87 L.Ed.2d at 352, n.6. The Eighth Circuit removed this inconsistency on remand and held that no specialized racketeering injury is required. Accordingly, there is no conflict between the holding of *Sedima* and the holding of the Eighth Circuit in *Grant I* and *Grant II.*

II.

There Is No Conflict Between The Decision Below And *Sedima* Or *Haroco* With Respect To The Pattern Of Racketeering Requirement.

With variations, both Tiffany and Kahn contend that a "pattern of racketeering activity" was not properly alleged or nonex-

istent, and that, consequently, the decision below conflicts with footnote fourteen of *Sedima*. Because this issue was never fully briefed below, it certainly is not ripe for Supreme Court review. Even if the untimeliness of the pattern argument is not a complete barrier, however, there is nothing in *Grant II* that in any way conflicts with this Court's discussion of the pattern requirements in *Sedima*. In *Grant II*, the court stated:

> Furthermore, while *Sedima* emphasizes that the definitions of pattern in section 1961(5) requires something more than just two acts of racketeering activity, ____ U.S. at ____ n.14, 105 S.Ct. at 3285 n.14, the complaint in this case alleges some tweny-six acts of mail fraud and four acts of wire fraud (the amended complaint alleges forty-eight and ten acts respectively). The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity.

770 F.2d at 718, n.1. Tiffany and Kahn clearly cannot divine any inconsistency between *Grant* and *Sedima* on this basis.[5]

Tiffany attempts to characterize its conduct as an isolated incident that exhibits no continuity, and asserts that the Eighth Circuit's holding means that multiple mailings of the same fraudulent prospectus could constitute a pattern of racketeering activity. (Tiffany Pet. at 8.). Kahn makes a similar argument, claiming that the fraudulent activities occurred only in 1977 and were stopped by Alexander Grant in that year before they succeeded. Petitioners' arguments are meritless. The nefarious scheme perpetrated by Tiffany against Alexander Grant was also designed to defraud creditors and shareholders, and to

---

[5] Tiffany's assertion that the threat of continuity was "[c]ompletely absent" from the Eighth Circuit's discussion of their pattern arguments can only be construed as an attempt to mislead this Court. *See* Tiffany Pet. at 8.

deceive the SEC. *Grant I,* 742 F.2d at 409. It was carried out over a long period of time.[6] Furthermore, this is not a case in which there are two criminal acts without any relationship. The Amended Complaint alleges forty-eight separate acts of mail fraud and ten acts of wire fraud. The Complaint in this case shows consistent, not sporadic, activity.

Moreover, Petitioners' position utterly ignores the plain meaning of *Sedima* and its discussion of the pattern requirements. *Sedima* itself involved a single scheme perpetrated by a series of predicate mail and wire fraud acts. Although this Court in *Sedima* did not decide whether the predicate acts fall into a pattern, the Court in no way suggested there was no pattern because this was the only instance in which Imrex violated a joint venture agreement through a series of fraudulent acts. Rather, the Supreme Court reasoned that under section 1962(c) "the essence of the violation is the commission of . . . [predicate] acts in connection with the conduct of an enterprise." 473 U.S. at ____, 105 S.Ct. at 3286, 87 L.Ed.2d at 359. It is unavailing to argue that a RICO violation may not consist of a single criminal episode effected through a pattern of unlawful acts.[7]

---

[6] Indeed, discovery has revealed that Tiffany's scheme was not limited to the attempted certification of its bogus 1977 financials. Tiffany sent fraudulent statements to Alexander Grant not only during the course of the 1977 audit, but also during the 1976 audit. Alexander Grant, unaware of that fraud, issued its opinion on Tiffany's 1976 financials justifiably relying, in part, on falsified documents created for the same apparent purposes as those that surfaced during the 1977 audit. Alexander Grant is prepared to show these occurrences at trial.

[7] *See, e.g., United States v. Weatherspoon,* 581 F.2d 595, 601-02 (7th Cir. 1978) (Five acts of mailfraud involved in single criminal scheme.); *United States v. Parness,* 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975) (Any two acts in same criminal episode constitute a pattern.); *United States v. Beatty,* 587 F.Supp. 1325, 1329 (E.D.N.Y. 1984) (Each of fourteen mailings are separate racketeering offenses; two or more constitute a pattern of racketeering activity.); *Noland v. Gurley,* 566 F.Supp. 210, 217 (D.Co. 1983) (Separate criminal acts are counted as racketeering activities even if

Sedima and *Haroco* stand for the proposition that RICO must be construed and enforced in accordance with the unambiguous language of the statute selected by Congress to accomplish its broad objectives. *Sedima,* 473 U.S. at ____, 105 S.Ct. at 3286-87, 87 L.Ed.2d at 358-361. In this case, under any reading of the statute, the straightforward elements of a section 1962(c) claim are alleged: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." 473 U.S. at ____, 105 S.Ct. at 3285, 87 L.Ed.2d at 358-59 (footnote omitted).[8]

In *Sedima,* this Court referred to the legislative history of RICO which suggests that there must be "continuity plus relationship" to show a pattern. Here, there is both — continuity over time and a relationship between the acts of racketeering activity. In *Sedima,* this Court also pointed to a legislative definition of pattern in a later section of the same bill. Paraphrasing that definition, the very definition employed by the Eighth Circuit in *Grant II,* the Amended Complaint clearly sets forth a pattern of criminal acts, embracing the same "purposes, results, participants, victims, or other methods of commission", not "isolated events." *Id.*, 473 U.S. at ____ n. 14, 105 S.Ct. at 3285 n. 14, 87 L.Ed.2d at 359, n. 14; 18 U.S.C. §3575(e). *See R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350, 1354-55 (5th Cir. 1985) (*Sedima* only requires that two acts of racketeering

---

they arise out of same criminal episode.); *United States v. Salvitti,* 451 F.Supp. 195, 200 (E.D.Pa. 1978) (Unnecessary to establish two or more independent criminal schemes.); *United States v. Moeller,* 402 F.Supp. 49, 58 (D.Conn. 1975) (Two acts on same day forming part of same criminal episode establish pattern.).

[8] RICO "is a carefully crafted piece of legislation" and "the structural interrelationship of the elements of the offense, as set forth in the statute, control." *United States v. Anderson,* 626 F.2d 1358, 1365 (8th Cir. 1980) *citing Iannelli v. United States,* 420 U.S. 770, 789 (1975).

activity be related.). *See also United States v. Gibson,* 486 F.Supp. 1230, 1241-43 (S.D.Oh. 1980). The decision below fully complies with the language of footnote fourteen in *Sedima.*

Kahn also remarkably suggests that because the fraud related to an attempt to obtain false certified financial statements, it was not the "conduct" of the enterprise's affairs "through a pattern of racketeering activity." "Conduct", however, simply refers to performance of any "activities necessary or helpful to the operation of the enterprise." *United States v. Martino,* 648 F.2d 367, 382 (5th Cir. 1981). Moreover, the "predicate acts" need not expressly and solely be in "furtherance of the enterprise." *United States v. LeRoy,* 687 F.2d 610, 616-17 (2d Cir. 1982). While Tiffany was certainly not in the business of obtaining financial statements and having audits performed, Kahn's position would create exceptions that swallow the statute and defy common sense. Tiffany, a public company, simply could not have conducted its affairs without obtaining audits. Tiffany, in the circumstances of this case, could not have conducted its affairs at all without the fraudulent financials. If a RICO violator is permitted to escape the statute because it claims it ordinarily does not conduct all of its regular business affairs through fraudulent or criminal schemes, civil RICO would be barren of any significance. Such a narrow argument could be made in every case involving misuse or infiltration of a business with fraudulent schemes. Kahn's position is akin to the conclusively-rejected argument that "legitimate" and "respected" enterprises should somehow not be subject to RICO. *Sedima,* 473 U.S. at ____, 105 S.Ct. at 3287, 87 L.Ed.2d at 360. *See also United States v. Turkette,* 452 U.S. 576, 586-87 (1981).

III.

Petitioners' "Proximate Cause" And "Infusion Of Income" Arguments Are Frivolous In The Circumstances Of This Case, And There Is No Conflict With The Seventh Circuit.

Tiffany asserts that the Eighth Circuit's treatment of its standing motion is inconsistent with *Sedima's* directive that standing requires injury to a plaintiff's business or property "by the conduct constituting the violation". In essence, Tiffany claims the Eighth Circuit, on the undeveloped factual record before it, should have held, as a matter of law, that Alexander Grant's alleged injuries were not proximately caused by the violation alleged. This is flatly contrary to this Court's discussion of the relationship between the alleged injury and the violation:

> Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by the predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Sedima, 473 U.S. at ____, 105 S.Ct. at 3286, 87 L.Ed.2d at 359.

There is no requirement that a plaintiff plead and prove that no other factors contributed to cause the alleged injury. It is too late to resurrect and reintroduce the now discredited "direct-indirect" injury dichotomy. The criminal conduct that violates Section 1962(c) must, either directly or indirectly, injure the plaintiff's business or property. *Haroco v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384, 387 (7th Cir. 1984) *aff'd* 473 U.S. ____, 105 S.Ct. ____, 87 L.Ed.2d 437 (1985). In *Haroco* this Court reasoned:

> The submission that the injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers

> from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in... [*Sedima*]."

Haroco, 87 L.Ed.2d at 440.

The Eighth Circuit held that several of Alexander Grant's specific allegations were sufficient to plead injuries suffered by " 'the conduct constituting the violation' rather than by other conduct of Tiffany." *Grant II*, 770 F.2d at 719. *See* App. A-30 - A-35, ¶¶ 30-35. The Eighth Circuit's resolution of this issue is unquestionably consistent with the teachings of *Sedima* and *Haroco*. Alexander Grant's Amended Complaint clearly alleges both direct and indirect injuries proximately caused by Tiffany and Kahn's conduct.[9] This Court certainly does not sit to decide whether a complaint contains sufficient factual allegations.

Kahn argues that there is no RICO claim because the "isolated" scheme never resulted in "infusion of income" into the enterprise. This argument is fatally flawed. Initially, this Court should note that Kahn's argument was, ironically, originally made to the Eighth Circuit in the form of a "racketeering enterprise injury" requirement. *Grant I*, 742 F.2d at 413. Having failed in his effort to convince the Eighth Circuit, or this Court, that there is a racketeering enterprise requirement, Kahn now attempts to recast the argument as a "financial gain" argument. (Kahn Pet. at 7.). Kahn cites in support of this contention various district court cases imposing the racketeering enterprise injury requirement rejected by this

---

[9] Kahn also re-argues, in the face of overwhelming precedent to the contrary, that the strictures of Clayton Act "antitrust standing" requirements apply in the context of civil RICO. This argument, long rejected in the Eighth Circuit, is clearly wrong in view of *Sedima's* discussion of the limitations of any such analogy. *Sedima*, 473 U.S. at ____, 105 S.Ct. at 3286-87, 87 L.Ed.2d at 359 n.15, 360. *See also Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982) *aff'd in relevant part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

Court (Kahn Pet. at 7 n.4), a Second Circuit case which Kahn claims stands for the proposition that there must be actual financial gain when in fact it only states that there must be a "financial purpose" behind the RICO violation (*United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983); *see United States v. Bajaric*, 706 F.2d 42, 56 (2d Cir. 1983) (the predicate acts of the enterprise must have a "financial purpose")), and dicta from two prior criminal decisions of this Court which refer to RICO's purpose of divesting from wrongdoers the money received from their crimes. None of these cases address the issue for which Kahn cites them.

More importantly, however, there is nothing in the legislative history or language of the RICO statute that requires that the fraudulent scheme must be successful before there is a RICO claim. Section 1962(c), by its terms, does not require any allegation that the enterprise actually make a profit from its racketeering activities. Rather, section 1962(c) is concerned with the "conduct of [an] enterprise's affairs" through a pattern of racketeering activity. Indeed, successful infusion of income clearly is not necessary to establish a violation of section 1962(a). *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980); *United States v. Cariello*, 536 F.Supp. 698, 699-701 (D.N.J. 1982). Kahn's argument is legally unsupportable.

Factually, Kahn's argument ignores the simple truth that Tiffany certainly did profit from and partially succeed in its scheme. Tiffany's fraudulent conduct, in connection with the 1977 audit, helped permit the artificial extension of its business thereby reflecting a "financial purpose." The fraudulent scheme directed at Alexander Grant was designed to ensure the success of Tiffany's separate but related plan to defraud its lenders, insurers, and others in connection with Tiffany's financial requirements and goals.

Not only is the requirement of a successful scheme contrary to the language of the statute, but such an argument leads to the "anomolous result that the racketeering activity must be allow-

ed to proceed to completion before civil recovery is permitted." *Grant I*, 742 F.2d at 414. In this case, losses to third parties were prevented because Alexander Grant acted to prevent the fraud from continuing. Given that there is a "financial purpose," there certainly is no logical or desirable reason to require the scheme to succeed before there can be a RICO private action. The Eighth Circuit correctly concluded that RICO standing should not turn on a defendant's fortuitous ability to succeed in its criminal endeavors before its victims are able to halt the criminal scheme. *Grant I*, 742 F.2d at 413-14.

Kahn additionally contends that the Eighth Circuit somehow failed to bring civil RICO back within "the original conception of its enactors." *Sedima*, 473 U.S. at ____, 105 S.Ct. at 3287, 87 L.Ed.2d at 361. To support his disregard for the plain language of the statute, Kahn advocates imposition of unwarranted restrictions on the applicability of civil RICO, restrictions that this Court in *Sedima* observed must be referred to Congress. Kahn's concept of the "pattern" requirements and his "infusion of income" argument both fall into this category.

Finally, Kahn argues that the decision below is inconsistent with *Cenco*, and *Cenco* finds support in *Sedima* because the Court in *Sedima* observed that persons injured by "other conduct", not the RICO violation, cannot sue under RICO. Kahn suggests that any other result would permit all professionals to sue for threefold their fees when they are not paid, somehow opening the floodgates of litigation. Kahn's policy contention is palpably frivolous. The unacceptable consequence uncritically posited by Kahn — use of RICO to collect professional fees — is a far cry from the massive scheme to defraud Alexander Grant apparent from the pleadings in this case. Indeed, the floodgates argument is best answered by noting that Kahn fails to identify any case after *Grant I* in which this theory was utilized.

Kahn's other arguments are likewise meritless. Kahn informs this Court that the accountant in *Cenco* sought damages exactly like those sought by Alexander Grant. (Kahn Pet. at 5.). In

fact, at trial the accountant in *Cenco* waived all damages other than the amounts it had paid in settlement to third parties. *Cenco*, 686 F.2d at 457. The Seventh Circuit held that these damages were not recoverable under RICO not because there was not causation,[10] but because such indemnification was not permissible when the only fraud alleged was directed against third party shareholders. Crossclaim ¶ 30 (predicate act is sale of securities to securities holders). Consequently, *Cenco*, which explicitly states that "[a]uditors are *not* detectives hired to ferret out fraud" (*Cenco*, 686 F.2d at 454), cannot be successfully used by Kahn to argue that auditors can never sue their clients under RICO because accountants assume the risk of loss of fees when they perform their job as accountants. *Cenco* simply has no such causation holding. Moreover, *Cenco* is completely distinguishable from this case. Here, as opposed to seeking only indemnification, Alexander Grant seeks numerous other damages inflicted as a result of the fraud directed against it, not solely "other conduct". Yet, even if this were not true, fundamentally, *Cenco* is no longer good law.

Cenco has been effectively overruled by subsequent Seventh Circuit decisions and clearly emasculated by this Court's *Sedima* and *Haroco* decisions. *Haroco*, 747 F.2d at 397-98; *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 653-54 (7th Cir. 1984); *Schacht v. Brown*, 711 F.2d 1343, 1358-59 (7th Cir.) *cert. denied* ____ U.S. ____, 104 S.Ct. 508, 509, 78 L.Ed.2d 698 (1983). Indeed, in *Sutliff*, the Seventh Circuit allowed a "tool" of a RICO defendant to sue under RICO and, instead of appealing to the purposes of RICO, looked to its plain language. Alexander Grant states a claim under *Sutliff*. The *Cenco* case is a paradigmatic example of a court inadvisedly attempting to restrict the literal reach of civil RICO on the basis of whether standing would comport with the perceived legislative objectives

---

[10] Indeed, the *Cenco* court upheld a breach of contract claim.

of the statute. *Cf. Illinois Dept. of Revenue v. Phillips,* 771 F.2d 312, 316-17 (7th Cir. 1985); *Haroco,* 747 F.2d at 399; *Schacht,* 711 F.2d at 1356. *Cenco* is, in fact, a direct application of the "direct-indirect" injury standing analysis which has been discarded in the wake of *Sedima. Cenco,* 686 F.2d at 457.

CONCLUSION

For the reasons stated above, Respondent urges this Court to deny the petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

WALTER M. CLARK
(Counsel of Record)
Catherine D. Perry
Glenn E. Davis
Armstrong, Teasdale, Kramer
& Vaughan
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for Respondent

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-191-C(3)

Alexander Grant & Company,
a partnership,
Plaintiff,

vs.

Tiffany Industries, Inc.,
Gail Martin, Farrell Kahn,
Abraham Appel, Joseph Simpkins,
Frank J. Leber, and Harriet
Cassel, a/k/a Esther Cassel,
Defendant.

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

Count I

Comes now Alexander Grant & Company and for Count I of its claim against defendants states:

A. Jurisdiction and Venue

1. Jurisdiction of this Court is founded upon the provisions of Chapter 96, U.S. Code, "Racketeer Influenced and Corrupt Organizations", Title 18 U.S.C. §§ 1961, 1962, 1963 and 1964.

2. This civil action is brought under 18 U.S.C. § 1964(c), which provides that any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962 may sue in the U.S. District Court for threefold damages.

3. Venue in this Court is founded upon 18 U.S.C. § 1965(a), in that defendants reside in the Eastern District of Missouri, or may be found in said District, or are transacting business in said District.

B. **The Parties.**

4. Plaintiff Alexander Grant & Company (hereinafter "Grant") is a partnership and brings this action in its common name pursuant to Rule 17(b)(1), F.R.C.P., for the purpose of enforcing a substantive right existing under the laws of the United States. Grant is a public accounting firm engaged in the business of rendering audit and accounting services throughout the United States. In the course of rendering its services, Grant represents numerous publicly held companies subject to regulation and supervision by the federal Securities and Exchange Commission ("SEC").

5. Defendant Tiffany Industries, Inc. ("Tiffany") is a corporation having its principal place of business in the Eastern District of Missouri. Tiffany is a publicly held company. Until approximately May 1, 1978, the stock of Tiffany was traded on the American Stock Exchange.

6. Defendant Farrell Kahn ("Kahn") is a resident of St. Louis County, Missouri. At all relevant times herein alleged, and until approximately May 1, 1978, Kahn was President and Chief Executive Officer ("CEO") of Tiffany and was a shareholder of Tiffany. As CEO of Tiffany, Kahn directed and controlled the business of Tiffany and its operations.

7. Defendant Joseph Simpkins ("Simpkins") resides in the Eastern District of Missouri. Simpkins is the father-in-law of defendant Kahn. At all relevant times herein alleged, Simpkins was the Chairman of the Board of Directors of Tiffany, directed and controlled the business of Tiffany and its operations, and was (and is) the beneficial owner of approximately 34% of the common stock of Tiffany. Simpkins claims to be "the

motivating force" behind Tiffany and claims that he and Tiffany are "viewed as one and the same" by the public and the business community.

8. Defendant Abraham Appel ("Appel") resides in the Eastern District of Missouri. At all relevant times herein alleged, and until approximately January, 1979, Appel was a Director and Vice-President and Chief Financial Officer of Tiffany. Prior to approximately May 10, 1978 Appel was a member of the Audit Committee of Tiffany's Board of Directors.

9. Defendant Frank J. Leber ("Leber") resides in the Eastern District of Missouri. At all relevant times herein alleged, Leber was a Vice-President of Tiffany.

10. Defendant Gail Martin ("Martin") resides in the Eastern District of Missouri. At all relevant times herein alleged, Martin was employed by Tiffany as a secretary to defendant Kahn.

11. Defendant Harriet Cassel, a/k/a Esther Cassel ("Cassel") resides in the Eastern District of Missouri. At all times relevant herein alleged, Cassel was employed by Tiffany as a secretary.

12. At all relevant times, defendants Simpkins, Appel, Leber, Kahn, Martin and Cassel, and all other officers, agents and employees of Tiffany, all as described herein, performed the activities alleged herein within their employment capacities with Tiffany and acted on behalf of Tiffany.

C. **Substantive Allegations.**

13. Defendants Tiffany, Simpkins, Kahn, Appel, Leber, Martin and Cassel were at all relevant times "persons" as defined in 18 U.S.C. § 1961(3).

14. At all relevant times herein there existed three distinct "enterprises," as defined in 18 U.S.C. § 1961(4), which enterprises were engaged in or the activities of which affected interstate or foreign commerce. These enterprises were:

(a) Tiffany Industries, Inc., a legal corporate entity, which sold its products in both interstate and foreign commerce.

(b) A group of individuals associated with Tiffany Industries Inc., who were associated in fact for the common purpose of defrauding and deceiving Grant. This enterprise possessed continuity of structure and personnel and an ascertainable structure distinct from the pattern of racketeering activity in which it engaged. The activities of this enterprise affected interstate commerce in various ways alleged hereafter, including, but not limited to, attempts to influence or deceive suppliers and customers of Tiffany who were located in various states and engaged in interstate commerce.

(c) A group of individuals consisting of all the employees of Tiffany Industries, Inc. These individuals were associated in fact for the common purpose of doing interstate and foreign business including, but not limited to, sales of agricultural equipment and systems.

All acts alleged hereafter to violate 18 U.S.C. § 1962(c) involved association with, the conduct of and the participation in the affairs of all of the above-described enterprises.

15. Defendants were at all relevant times associated with the above described enterprises and their business operations and affairs. Defendants did unlawfully, willfully and knowingly conduct and participate, directly and indirectly, in the conduct of those enterprises' affairs through a pattern of racketeering activity as defined in 18 U.S.C. § 1961(5), in violation of 18 U.S.C. § 1962(c), to the damage of Grant as hereafter alleged.

16. SEC regulations require public companies, including Tiffany, to retain independent public accountants to audit their books and to certify to their financial statements. SEC regulations further require filings by Tiffany and other public companies of independently audited financial statements, and the SEC and the investing public sometimes rely upon the accuracy

and reasonableness of said financial statements. For several years prior to 1978 and until approximately May 22, 1978, Tiffany retained Grant to render accounting and auditing services. Tiffany's fiscal year ends on December 31. Grant's services rendered to Tiffany included annual audits of Tiffany's books and records. The results of audits conducted by Grant were incorporated by Tiffany into its annual reports to stockholders. These reports were disseminated to Tiffany's lenders and were also filed with the SEC as required by Federal securities laws.

17. Sometime prior to June 20, 1977, the exact time presently unknown to plaintiffs, defendants Simpkins, Kahn, Appel, Leber and other officers and employees of Tiffany became aware that Tiffany's actual financial position was unsound and that if "generally accepted accounting principles" ("GAAP") were applied, Tiffany was incurring losses rather than earnings. Defendants sought to conceal this fiscal instability from Tiffany's shareholders, creditors and the investing public, and sought to present a false picture of financial soundness to those persons. Pursuant to this desire to present a false picture of financial soundness, defendants devised a scheme or artifice to defraud Grant and, pursuant to that scheme or artifice to defraud Grant, committed the acts constituting the violations of 18 U.S.C. § 1962(c) hereafter alleged, which violations were intended to injure and did injure Grant as set forth hereafter. Defendants sought to defraud Grant by deceiving Grant into approving financial statements which were false, misleading and fraudulent and thus to use Grant to create an image of financial stability and profitability. Grant was thus the direct and specific object of defendants' violations of 18 U.S.C. § 1962.

18. Tiffany misrepresented its true financial position to its lenders in order to obtain financing. Tiffany did not retain Grant to conduct interim audits or reviews of Tiffany's books and records during the year. Accordingly, during the fiscal year ended December 31, 1977, Tiffany was able to record certain sales (as hereinafter described) and to make other entries to its

books without any check by independent auditors. Tiffany "closed" its 1977 books and sought to show earnings for the fiscal year ending December 31, 1977. After adjustments proposed by Tiffany, defendants Kahn, Simpkins, Appel, Leber and other officers and employees of Tiffany knew that if the actual financial facts (applying GAAP) concerning its 1977 performance were discovered, Tiffany would have sustained a substantial loss for the year instead of a profit as shown on Tiffany's books.

19. Pursuant to the scheme or artifice to deceive Grant into approving false, misleading and fraudulent financial statements, defendants Kahn, Appel, Leber and other officers and employees of Tiffany knowingly gave Grant false, misleading and fraudulent material information, intending that Grant accept such information as valid and accurate so that it would be restated in Tiffany's financial statements. Defendant Simpkins withheld material financial information from Grant, and upon information and belief, knew that other officers and employees of Tiffany were giving material false information to Grant. Defendants further sought to deceive Grant into restricting the scope of its audit investigations by complaining that the scope was excessive and by withholding payment of fees for services due and theretofore promised to Grant for services performed by Grant during the course of the audit. Defendants further sought to induce Grant to "certify" its audit and financial statements to the SEC and to stockholders, thus lending Grant's reputation and credibility as independent auditors to such false and fraudulent financial statements.

(i) **The Nigerian Transactions.**

20. In June, 1977 Tiffany recorded on its books a purported sale to the Government of Nigeria (hereinafter the "Nigerian sale") in the approximate amount of $3,500,000. The effect of Tiffany's recording the purported sale was to increase substantially Tiffany's net income for 1977 (or to decrease losses

substantially). The recording of such sale by Tiffany was effected unilaterally, that is, without audit by Grant.

21. In late December, 1977 when Grant personnel commenced work on the audit of Tiffany's books for 1977, the purported Nigerian sale was brought to Grant's attention. Grant discovered that most of the products allegedly "sold" by Tiffany in 1977 to the Government of Nigeria had not, in fact, been shipped by Tiffany to the customer. Additionally, Grant's investigation revealed that a substantial portion of the products allegedly "sold" by Tiffany in 1977 were products Tiffany was to purchase from suppliers, and most of those products had not even been purchased by Tiffany for delivery to the Government of Nigeria.

22. As the result of discoveries by Grant as alleged in paragraph 19, serious and substantial questions arose as to whether, in accord with GAAP, Tiffany had properly recorded the Nigerian sale, and whether Tiffany had the right to reflect in its financial statements the substantial earnings (or reduction in losses) which would result from such a sale. Grant personnel communicated to defendant Kahn and to other Tiffany personnel their serious doubts as to the validity of the purported "sale". Tiffany personnel and representatives of Tiffany aggressively sought to persuade Grant to "sign off" on said sale, that is, to certify that said purported "sale" was indeed a sale in accord with GAAP.

23. Between January and May, 1978, defendants conducted or participated, directly or indirectly, in the conduct of the enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), in that they committed acts violating 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud) as part of a fraudulent scheme or artifice to deceive Grant and to induce Grant to certify the purported Nigerian sale as a sale in accord with GAAP. More specifically:

(a) In early 1978, Tiffany personnel, including but not limited to Kahn and Leber, represented to Grant personnel that the

Nigerian sale should be recognized as a sale for various reasons, including Tiffany's representation that while the products "sold" had not yet been delivered, nevertheless Tiffany had issued purchase orders in June 1977 (before the Nigerian sale was recorded by Tiffany) to various suppliers, and that the suppliers were "holding" the products prior to June 30, 1977, awaiting only shipment instructions from Tiffany. Tiffany personnel urged Grant personnel to consider such products as "sold" under GAAP and pursuant to Tiffany's "revenue recognition program", since Tiffany was allegedly obbligated to pay the suppliers for such products (by virtue of the purchase orders), and the products were allegedly ready for shipment.

(b) In response to the representations by Tiffany as described in subparagraph (a), Grant personnel requested of Tiffany confirmation from each supplier as to the following: (1) that Tiffany had in fact issued the purchase orders to the various suppliers prior to June 30, 1977 (the date as of which the Nigerian sale was recorded); (2) that the suppliers in fact had been holding the products so ordered for Tiffany prior to June 30, 1977.

(c) The representations made by Tiffany and Tiffany personnel as described in subparagraph (a) were false and fraudulent and known to be so when made. Tiffany had not, in fact, issued such purchase orders prior to June 30, 1977 as represented, nor were said products being held (per any such purchase orders) by said suppliers awaiting orders for shipment.

(d) Upon information and belief, Defendant Simpkins knew that Kahn and Leber, or other Tiffany employees or officers, were providing false and misleading information to Grant in an effort to deceive Grant into agreeing that the Nigerian sale should be recognized in 1977.

(e) In response to Grant's requests for supplier confirmations as descried in suparagraph (b) above, and in furtherance of the scheme or artifice to defraud Grant as described above, Tiffany,

Kahn, Leber, Martin, or Cassel, or other Tiffany officers or employees working at their direction, concocted a plan to provide confirmations by fraudulent means or to manufacture the confirmations themselves. Pursuant to that plan, said defendants backdated purchase order forms to show order dates of early June 1977, mailed these purchase orders to the suppliers and asked that they falsely confirm that they had received the purchase orders prior to June 30, 1977 and had been holding the equipment since some time shortly after receipt of the order, awaiting only shipping instructions from Tiffany. If the suppliers refused or failed to falsely confirm as requested, Kahn, Leber, Martin and Cassel, or any of them, or other Tiffany officers or employees working at their direction, forged confirmation letters from the suppliers. These forged letters and the genuine letters solicited by Kahn and Leber, all of which contained false information, were provided to Grant by Tiffany or Kahn in an attempt fraudulently to induce Grant to recognize the revenue as described above.

(f) After being provided with those false confirmations, Grant personnel advised Tiffany that Grant sought to "reconfirm" the representations by having Tiffany address an additional letter to some of the suppliers. Grant sought to ask a representative group of suppliers whether the purported Purchase Order to each supplier was, indeed, received by the supplier prior to June 30, 1977, and whether the material supposedly ordered by the Purchase Order had, indeed, been held for Tiffany's account and continued to be so held. A draft of such a confirmation letter was prepared and on or about March 13, 1978, Defendant Kahn had those letters typed on Tiffany letterhead and mailed to six of the suppliers. All of these actions were taken for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false, fraudulent and misleading financial statements which would distort Tiffany's actual earnings or losses.

24. In the course of executing the above transactions as to seventeen different suppliers, Tiffany, Kahn, Leber, Martin and Cassel, or one or more of them, or other Tiffany officers or employees acting at their direction committed at least 37 acts of mail fraud and 5 acts of wire fraud, as those offenses are defined by 18 U.S.C. §§ 1341 and 1343. The specific violations are described in full in subparagraphs (a) through (q) below. Each of those mail fraud and wire fraud violations was a part of a pattern of racketeering activity (as defined in 18 U.S.C. § 1961(5)) carried out by Tiffany, Kahn, Leber, Martin and Cassel, or any one or more of them, in the conduct of the enterprises' affairs in violation of 18 U.S.C. § 1962(c). Upon information and belief, Simpkins, with knowledge of the fraud, failed to disclose to Grant that the other defendants were providing false and misleading information to Grant pursuant to the scheme or artifice to defraud Grant, and so aided and abetted the other defendants in their violation of 18 U.S.C. § 1962(c). The violations of 18 U.S.C. § 1962(c) described below were directed at Grant and done for the purpose of injuring Grant, by attempting to induce Grant to approve recognition of the income from the transaction.

(a) **The Essmueller Co. ("Essmueller").** Tiffany presented to Grant two letters (Exhibits A and B) confirming receipt of three purchase orders (Tiffany Purchase Orders Numbered 431 (Exhibit C), 485 (Exhibit D), and 494 (Exhibit E)). The two letters were forgeries and falsely confirmed that Essmueller had received the purchase orders dated June 7 and 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase orders. In fact, none of the purchase orders had been received by Essmueller prior to June 30, 1977: one of the purchase orders (No. 431, Exhibit C) was not received until December of 1977, and the other two purchase orders (No. 485 (Exhibit D) and No. 494 (Exhibit E)) were never received by Essmueller. Furthermore Essmueller, in response to a Tiffany request for confirmation of receipt of purchase order

No. 431, was induced to mail a letter (Exhibit F), signed by Ed Bennett, to Tiffany. Kahn, Martin, Cassel or someone acting at Kahn's direction used the letterhead and signature from that genuine letter (Exhibit F), to create the forged letters (Exhibits A and B).

(b) **Burdick Aeration & Electronics Corporation ("Burdick").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's office in St. Louis, Missouri, the Burdick Aeration & Electronics Corporation in Decatur, Illinois, and requested that Burdick confirm that Purchase Order No. 432 (Exhibit G) had been received prior to June 30, 1977, and that Burdick had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, purchase order No. 432 had not been received by Burdick prior to June 30, 1977, and was not received until on or about December 12, 1977. In response to Leber's telephone request, Lynda Johnson ("Johnson"), a Burdick employee, mailed a letter (Exhibit H) to Tiffany, providing the false confirmation. Tiffany presented that letter to Grant, falsely representing that the statements therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Burdick asking for reconfirmation of the above-described false statements. On March 15, 1978, Johnson was induced to sign the Kahn letter (Exhibit I), again falsely confirming the misrepresentations. Burdick then mailed the letter to Tiffany or to Grant.

(c) **Hunter Mfg. Co. ("Hunter").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Hunter Mfg. Co. in Mackinaw, Illinois, and requested that Hunter confirm that Tiffany Purchase Orders Numbered 433 (Exhibit J), 441 (Exhibit K), 442 (Exhibit L), 443 (Exhibit M), and 448 (Exhibit N) had been received prior to June 30, 1977,

and that Hunter had been holding the equipment, awaiting shipping instructions, since shortly after receipt of the purchase orders. In fact, none of the above-described purchase orders was received by Hunter prior to June 30, 1977: they were apparently received in December of 1977. In response to Leber's telephone request, William E. Hunter, a Hunter officer and employee, was induced to mail two letters (Exhibits O and P) to Tiffany providing the false confirmations. Tiffany presented those letters to Grant, falsely representing that the statements therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Hunter asking for reconfirmation of the above-described false statements (Exhibit Q). On or about March 14, 1978, William E. Hunter was induced to sign the Kahn letter (Exhibit Q) again falsely confirming the misrepresentations. Hunter then mailed the letter to Tiffany or to Grant.

(d) **Universal Industries ("Universal").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, Universal Industries in Waterloo, Iowa, and requested that Universal confirm that Tiffany Purchase Orders No. 434 (Exhibit R), 484 (Exhibit S), 488 (Exhibit T) and 491 (Exhibit U) had been received by Universal prior to June 30, 1977, and that Universal had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase orders. In fact, none of these purchase orders was received by Universal prior to June 30, 1977: Purchase Order No. 434 was not received until on or about December 7, 1977, and Purchase orders Numbered 484, 488 and 491 were not received by Universal until on or about March 13, 1978. In response to Leber's telephone request, Norman E. Armstrong ("Armstrong"), a Universal employee, was induced to mail two letters (Exhibits V and W) to Tiffany, providing the false confirmation. Tiffany presented those letters to Grant, falsely representing that the statements

therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Universal asking for reconfirmation of the above-described false statements. On or about March 22, 1978, Armstrong was induced to sign the Kahn letter (Exhibit X) again falsely confirming the misrepresentations. Armstrong then mailed the letter to Tiffany or to Grant.

(e) **Garner Mfg. Co. ("Garner").** Tiffany presented to Grant a letter (Exhibit Y) confirming receipt of Tiffany Purchase Order Number 435 (Exhibit Z). The letter was a forgery and falsely confirmed that Garner Mfg. Co. had received Purchase Order No. 435 dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 435 (Exhibit Z) did not exist prior to June 30, 1977, and was not received by Garner until December of 1977. Kahn, Cassel or Martin, or someone acting at Kahn's direction, forged the letter (Exhibit Y), purportedly from Philip Mullin of Garner and presented it to Grant.

(f) **Energy Mfg. Co., Inc. ("Energy").** Tiffany presented to Grant a letter (Exhibit 2A) confirming receipt of Tiffany Purchase Order No. 436 (Exhibit 2B). The letter was a forgery and falsely confirmed that Energy and received the purchase order dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 436 (Exhibit 2B) did not exist prior to June 30, 1977, and was not received by Energy until December of 1977. Furthermore Energy, in response to Tiffany's request for confirmation of Purchase Order No. 436, was induced to mail a letter (Exhibit 2C) signed by Sandy McQuillen to Tiffany. Kahn, Cassel or Martin, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2C), to create the forged letter (Exhibit 2A).

(g) **Forsbergs International Sales Corp. ("Forsbergs").** Tiffany presented to Grant a letter (Exhibit 2D) confirming receipt of Tiffany Purchase Order No. 437 (Exhibit 2E). The letter was a forgery and falsely confirmed that Forsbergs had received Purchase Order No. 437 dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 437 (Exhibit 2D) did not exist prior to June 30, 1977, and was not received by Forsbergs until Decemer of 1977. Furthermore, Forsbergs, in response to a Tiffany request for confirmation of Purchase Order No. 437, was induced to mail a letter (Exhibit 2F), signed by Harry M. Donarski to Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2F), to create the forged letter (Exhibit 2D).

(h) **CEA Carter International, Inc. ("Carter").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, CEA Carter International, Inc. in N.E. Minneapolis, Minnesota, and requested that Carter confirm that Purchase Order No. 438 (Exhibit 2G) had been received prior to June 30, 1977 and that Carter had been holding the equipment since shortly after receipt of the purchase order. In fact, Purchase Order No. 438 did not exist prior to June 30, 1977, and was not received by Carter until on or about December 7, 1977. In response to Leber's telephone request, Laverne Vest ("Vest"), a Carter employee, was induced to mail a letter (Exhibit 2H) to Tiffany, providing the false confirmation. Tiffany presented that letter to Grant, falsely representing that the statements therein were true.

(i) **Sprout-Waldron (Koppers Co.)** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, Sprout-Waldron in Muncy, Pennsylvania, and requested that Sprout-Waldron confirm that Tiffany Purchase Orders No. 439

(Exhibit 2I) and 440 (Exhibit 2J) had been received prior to June 30, 1977 and that Sprout-Waldron had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, Purchase Order Nos. 439 and 440 did not exist prior to June 30, 1977, and were not received by Sprout-Waldron until December of 1977. Sprout-Waldron refused to send such a false confirmation letter. Thereafter, Kahn, Martin or Cassel, or someone acting at Kahn's direction, created a forged confirmation letter (Exhibit 2K), which Kahn and Tiffany then presented to Grant.

(j) **Howe Richardson Scale Company ("Howe Richardson").** On or about February 20, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Howe Richardson Scale Company at Maryland Heights, Missouri, and requested that Howe Richardson confirm that Purchase Orders No. 447 (Exhibit 2L) and 483 (Exhibit 2M) had been received prior to June 30, 1977; and that Howe Richardson had been holding the equipment since shortly after receipt of the purchase order. In fact, neither purchase order existed prior to June 30, 1977; Purchase Order No. 447 (Exhibit 2L) was not received by Howe Richardson until on or about December 7, 1977, and Purchase Order No. 483 (Exhibit 2M) was not received by Howe Richardson until on or about March 13, 1978. Upon Howe Richardson's failure to send such a false confirmation, Kahn, Martin or Cassel, or someone acting at Kahn's direction, created a forged letter (Exhibit 2N), purportedly from Tom Shannon at Howe Richardson. Tiffany or Kahn then presented the forged false confirmation letter to Grant. On or about March 13, 1978, in response to Grant's request for "reconfirmation," Kahn or someone acting at his direction mailed a letter to Howe Richardson asking for reconfirmation of the above-described false statements. On March 15, 1978, Tom Shannon was induced to sign the Kahn letter (Exhibit 2O), falsely confirming the misrepresentations. Howe Richardson then mailed the letter to Tiffany or to Grant.

(k) **Baldor-Baumann Company ("Baldor").** On or about February 8, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Baldor-Bauman Company at Chesterfield, Missouri, and requested that Baldor confirm that Purchase Order No. 449 (Exhibit 2P) had been received prior to June 30, 1977 and that Baldor had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, Purchase Order No. 449 did not exist prior to June 30, 1977, and was not received by Baldor until on or about December 8, 1977. Baldor, in response to Leber's request, was induced to mail a letter (Exhibit 2Q) signed by O. A. Baumann to Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2Q), to create a forged letter (Exhibit 2R), falsely confirming receipt of the purchase order. Tiffany then presented the forgery to Grant.

(l) **Superior Equipment Mfg. Co. ("Superior").** Tiffany presented to Grant a letter (Exhibit 2S) confirming receipt of three purchase orders (Tiffany Purchase Orders Numbered 444 (Exhibit 2T), 445 (Exhibit 2U) and 446 (Exhibit 2V)). The letter was a forgery and falsely confirmed that Superior had received the purchase orders dated June 7, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase orders did not exist prior to June 30, 1977, and were not received by Superior until December of 1977. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the forged letter (Exhibit 2S) falsely confirming receipt of the purchase orders. Tiffany and Kahn then presented that letter to Grant, knowing it was forged and contained false information.

(m) **Ferrell-Ross.** Tiffany presented to Grant a letter (Exhibit 2W) confirming receipt of Tiffany Purchase Order No. 486 (Exhibit 2X). The letter was a forgery and falsely confirmed that Ferrell-Ross had received the purchase order dated June 8,

1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Ferrell-Ross until March of 1978. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 2W) falsely confirming receipt of the purchase order. Tiffany and Kahn then presented that letter to Grant, knowing it was forged and contained false information. On or about March 13, 1978, in response to Grant's request for "reconfirmation" Kahn, or someone acting at his direction, mailed a letter to Ferrell-Ross asking for reconfirmation of the above-described false statements. On March 17, 1978, a Ferrell-Ross employee was induced to sign the Kahn letter (Exhibit 2Y) again falsely confirming the misrepresentations, and mailed it to Tiffany or to Grant.

(n) **Seedburo Equipment Co. ("Seedburo").** Tiffany presented to Grant a letter (Exhibit 2Z) confirming receipt of two purchase orders (Tiffany Purchase Orders Numbered 427 (Exhibit 3A) and 493 (Exhibit 3B)). The letter was a forgery and falsely confirmed that Seedburo had received the purchase orders dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase orders. In fact the purchase orders did not exist prior to June 30, 1977, and were not received by Seedburo until July of 1978, when Seedburo requested copies of them in connection with the investigation surrounding Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the forged letter (Exhibit 2Z), purportedly from Jack T. Snader at Seedburo. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(o) **Gustafson Mfg. Co. ("Gustafson").** Tiffany presented to Grant a letter (Exhibit 3C) confirming receipt of Tiffany Purchase Order No. 489 (Exhibit 3D). The letter was a forgery and falsely confirmed that Gustafson had received the purchase order dated June 10, 1977, and had been holding the equipment

awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Gustafson until March 13, 1978. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 3C), purportedly from Gene T. Billmyre at Gustafson. Tiffany or Kahn then presented the forged false confirmation letter to Grant. On or about March 13, 1978, in response to Grant's request for "reconfirmation," Kahn or someone acting at his direction mailed a letter to Gustafson asking for reconfirmation of the above-described false statements. On March 15, 1978, Gene T. Billmyre was induced to sign the Kahn letter (Exhibit 3E) falsely confirming the misrepresentations, and mailed it to Tiffany or to Grant.

(p) **Hagan Mfg. Co. ("Hagan").** Tiffany presented to Grant a letter (Exhibit 3F) confirming receipt of Tiffany Purchase Order No. 490 (Exhibit 3G). The letter was a forgery and falsely confirmed that Hagan had received the purchase order dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Hagan until December of 1977. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 3F), purportedly from Pete Brunson at Hagan. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(q) **Merritt Roaster Corp. ("Merritt").** Tiffany presented to Grant a letter (Exhibit 3H) confirming receipt of Tiffany Purchase Order No. 492 (Exhibit 3I). The letter was a forgery and falsely confirmed that Merritt had received the purchase order dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was never received by Merritt. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the

forged letter (Exhibit 3H), purportedly from Alice Goede at Merritt. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(r) Having devised the scheme or artifice to defraud Grant and in order to execute or attempt to execute that scheme or artifice, the following acts (more specifically described above) were violations of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud), which were parts of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c):

(i) On or about the dates listed below defendants transmitted in interstate commerce by means of wire communications certain signs, signals and sounds (that is, the following described telephone calls made from St. Louis, Missouri) in violation of 18 U.S.C. § 1343 (wire fraud):

Date Of Telephone Calls	**Supplier (Person Called)**	**Location Called**
1/27/78	Burdick	Decatur, Illinois
1/27/78	Hunter	Mackinaw, Illinois
1/27/78	Universal	Waterloo, Illinois

Date Of Telephone Calls	**Supplier (Person Called)**	**Location Called**
1/27/78	Carter	N.E. Minneapolis, Minnesota
1/27/78	Sprout-Waldron	Muncey, Pennsylvania

(ii) On or about the dates listed below, defendants placed in a post office or other authorized depository for mail the following described letters and purchase orders to be delivered by the U.S. Postal Service, in violation of 18 U.S.C. § 1341 (mail fraud):

MAILED

Date	Addressee (Supplier)	Exhibit No.
12/77	Essmueller	C
12/12/77	Burdick	G
3/13/78	Burdick	I
12/7/77	Hunter	J
12/7/77	Hunter	K, L, M & N
3/13/78	Hunter	Q
12/7/77	Universal	R
3/13/78	Universal	S, T, U & X
12/77	Garner	Z
12/77	Energy	2B
12/77	Forsbergs	2E
12/77	Carter	2G
12/6/77	Sprout-Waldron	2I
12/8/77	Sprout-Waldron	2J
12/7/77	Howe Richardson	2L
3/13/78	Howe Richardson	2M & 2O
12/8/77	Baldor	2P
12/77	Superior	2T, 2U & 2V
3/13/78	Ferrell-Ross	2X & 2Y
3/13/78	Gustafson	3D & 3E
12/77	Hagan	3G

(iii) On or about the dates listed below, defendants caused the above-described letters to be delivered to Tiffany's offices by mail from the following suppliers, in violation of 18 U.S.C. § 1341 (mail fraud):

CAUSED TO BE MAILED

Date	Sender (Supplier)	Exhibit No.
1/27/78	Essmueller	F
1/27/78	Burdick	H
3/15/78	Burdick	I
1/27/78	Hunter	O
2/20/78	Hunter	P
3/14/78	Hunter	Q
1/27/78	Universal	V
2/17/78	Universal	W
3/22/78	Universal	X
2/3/78	Energy	2C
2/8/78	Forsbergs	2F
1/27/78	Carter	2H
3/15/78	Howe Richardson	2O
2/8/78	Baldor	2Q
3/17/78	Ferrell-Ross	2Y
3/13/78	Gustafson	3E

25.(a) In early 1978, Grant raised the question whether the Government of Nigeria (the alleged purchaser, sometimes referred to as the "Bendel Food Production Board") had made arrangements to provide Tiffany sufficient assurance that amounts due Tiffany under the purported Nigerian contract (described in paragraph 18) would be paid. Defendant Kahn and other Tiffany officers and employees represented to Grant that "financing" had been arranged, and that a consortium of banks in Nigeria had made commitments to loan the Purchaser

sufficient funds to make full payment to Tiffany for products sold under the Nigerian contract. As purported proof of said financing commitments, defendant Kahn, acting in behalf of defendant Tiffany, delivered to Grant the following documents (marked as follows and incorporated herein):

Exh. 3J: Letter dated 3/9/78 to Tiffany from W.J. Anukpe, Chairman/Managing Director, New Nigeria Bank Ltd. (the "Anukpe letter").

Exh. 3K: Letter dated 3/20/78 to Tiffany, from M. Insole, Principal Manager, Standard Bank Nigeria Limited (the "Insole letter").

Exh. 3L: Letter dated 3/17/78 to Tiffany from W. D. Keatinge, Ag. Assistant General Manager, Barclay's Bank of Nigeria, Limited (the "Keatinge letter").

Exh. 3M: Telex dated 3/20/78 to Tiffany from H. C. Arnold, Director, Standard Bank Nigeria Limited (the "Arnold telex").

Defendant Kahn represented to Grant that Tiffany had received Exhibits 3J, 3K, 3L and 3M from the Nigerian banks designated in said exhibits, and further represented that by virtue of said letters, telexes, and other assurances given Kahn by the banks and by the Purchaser, payment in full under the Nigerian contract was assured.

(b) The representations made by defendant Kahn and by other Tiffany employees as described in subparagraph (a) were false and fraudulent and known to be so when made. Upon information and belief, Simpkins knew that Tiffany had not received sufficient assurances from the Nigerian banks, and he knew that other Tiffany personnel were falsely representing to Grant that sufficient assurances had been obtained. Simpkins failed to disclose this information to Grant.

(c) Exhibits 3J, 3K, 3L and 3M listed above are forgeries and contain false information. In fact, Kahn, Appel, Martin or Cassel, or someone acting at their direction, created Exhibits 3J, 3K, 3L and 3M. More specifically:

(i) The Anukpe letter, Exh. 3J, is a forgery, the purported signature having been forged by defendant Kahn, Martin or Cassel, or some other Tiffany officer or employee acting in Tiffany's behalf. Although represented as having been typed and prepared in Nigeria, Exhibit S was in fact typed at Tiffany's offices in St. Louis County, Missouri by Kahn, Martin or Cassel, or some other Tiffany officer or employee acting in Tiffany's behalf.

(ii) The Insole letter, Exh. 3K, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices on the same Tiffany typewriter used to type the forged Anukpe letter, and is a forgery.

(iii) Upon information and belief, Grant alleges that the Keatinge letter, Exhibit 3L, is a forgery.

(iv) The Arnold telex, Exh. 3M, was not in fact sent by Arnold, and is a forgery.

(d) Upon information and belief, Grant further alleges:

(i) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, placed (or caused to be placed) in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Postal Service, each of the three fictitious, spurious and fraudulent letters described above (Exhibits 3J, 3K and 3L) in violation of 18 U.S.C. §1341.

(ii) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted in interstate or foreign commerce, by means of wire communications, certain writings, signs, signals and sounds, specifically, telephone and telex communications of the contents or substance of the contents of Exhibits 3J, 3K, 3L and 3M, in violation of 18 U.S.C. § 1343 (wire fraud).

(iii) The violations of 18 U.S.C. §§ 1341 and 1343 described above were parts of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c). The forgeries and illegal uses of the mails and wire communications and the conduct of Tiffany's affairs through that pattern of racketeering activity was directed at Grant with the intent of deceiving Grant to its detriment.

26. In a false and fraudulent attempt to pressure Grant into certifying the Nigerian transaction as a sale, Tiffany engaged the services of four independent public accounting firms and furnished to said firms the fictitious, spurious and fraudulent documents (Exhs. 3J, 3K, 3L and 3M) and other false, misleading and fraudulent materials. Tiffany intended, by such fraudulent actions, to persuade said accounting firms to render opinions to the effect that the Nigerian sale should be recognized, and thus to coerce Grant to render such opinion. Based upon the false representations made to said firms, they did indeed render such opinions. Upon information and belief, Grant further alleges that at various times (the specific instances presently unknown to Grant), officers, directors and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and

fraudulent representations (as heretofore alleged), and for the purpose of executing such scheme or artifice, placed or caused to be placed in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, and transmitted by wire or telex in interstate or foreign commerce, false and fraudulent communications to said accounting firms and to others, in violation of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). These mail fraud and wire fraud violations were part of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c) for the purpose of deceiving and injuring Grant.

(ii) **Steelabrade.**

27. Having devised the scheme or artifice to defraud Grant as heretofore alleged, defendants further conducted or participated, directly or indirectly, in the conduct of the enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), in the following particulars:

(a) In late February or early March, 1978, defendant Kahn, in furtherance of said scheme to defraud Grant, called (on the telephone) one James V. Murphy ("Murphy"), who was President of Steelabrade Corporation ("Steelabrade"), a supplier of products to Tiffany. Kahn, with full knowledge that as of December 31, 1977, and early March, 1978, Steelabrade held no Tiffany "inventory" in its possession, nevertheless fraudlently and willfully attempted to induce Murphy to represent to Grant that Steelabrade did, in fact, have in its possession as of December 31, 1977 and early March, 1978 certain inventory purportedly the property of Tiffany. Murphy refused Kahn's fraudulent request, whereupon Kahn directed Murphy to prepare and deliver to Kahn a schedule of all purchases during 1977 of Steelabrade products by Tiffany. Murphy complied.

(b) Kahn falsely and fraudulently represented to Grant that Steelabrade held in its possession (as of December 31, 1977 and

early March, 1978) approximately $500,000 in "inventory" (products sold by Steelabrade to Tiffany and other products, all of which were purportedly held in Steelabrade's possession). Kahn, in furtherance of the above-described scheme or artifice to defraud and in violation of 18 U.S.C. § 1341, caused Grant (who relied on Kahn's fraudulent misrepresentations) to place in a post office or authorized depository for mail, to be sent or delivered by the U.S. Post Office Department, a confirmation request, (Exhibit 3N) that is, a written request that Steelabrade confirm to Grant that Steelabrade did, in fact, have in its possession said inventory.

(c) On or about March 8, 1978, Kahn, Cassel or Martin, or someone acting at Kahn's direction, prepared a schedule showing sales by Steelabrade to Tiffany during 1977 and additional products. The total of said sales and other property was valued at approximately $500,000. To the schedule defendants attached a confirmation request. Defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, signed the name "James V. Murphy" (President of Steelabrade) to said document and dated the same. Said signature was made without the knowledge, consent or authorization of Murphy, and is a forgery. Further, defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, inserted the following typed language in the confirmation request (Exhibit 30):

> Attached please find a list of materials that was either purchased from us going back to 1976 or was delivered to our facility for processing during 1977. This inventory was at our premises at December 31, 1977 and March 1, 1978."

The insertion of said language was done without the knowledge, consent or authorization of Murphy, and is a false statement.

(d) Defendants Kahn, Cassel and Martin committed the acts herein alleged as part of a scheme to defraud Grant, in that Defendants by means of false representations and forgery, intended to deceive Grant into believing that Tiffany owned some

$500,000 in inventory in the possession of Steelabrade. Defendants further attempted to deceive Grant into making a certified audit which would reflect ownership by Tiffany of said inventory. Such certification would have materially increased Tiffany's earnings (or decreased its losses) for 1977, and would have distorted Tiffany's actual financial condition as of December 31, 1977.

(e) On or about March 8, 1978, defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, placed in a post office or authorized depository for mail, to be sent or delivered by the U.S. Post Office Department, the fictitious, fraudulent and forged confirmations (Exhibit 30), addressed to Grant at its offices in Clayton, Missouri and to Murphy at Steelabrade's offices in St. Louis County, Missouri, in violation of 18 U.S.C. § 1341. Said violations of 18 U.S.C. § 1341 were part of a pattern of racketeering activity through which the enterprises' affairs were conducted in violation of 18 U.S.C. § 1962(c).

(iii) **Farm Store Inventories.**

28. Beginning in late December of 1977, in preparation for and as a part of the 1977 audit to be conducted by Grant, Tiffany counted its inventories at its various facilities. Grant, as part of its audit, reviewed the inventories prepared by Tiffany. Tiffany, in order to conceal its true financial condition, and to deceive Grant into unknowingly assisting it in presenting false and misleading financial statements, represented to Grant that the inventories as originally taken at Tiffany's farm stores were inaccurate and should be adjusted upward. Specifically, Tiffany represented that Tiffany's farm stores each held additional inventory that had not been counted originally, and which should be added to the original inventory figures. In fact, the farm stores held no additional inventory. Defendants Tiffany, Kahn, Leber and Appel, or other Tiffany officers or employees working at their direction, knew at the time that the representations concerning additional inventory were false. Tiffany, Kahn, Ap-

pel and Leber made the misrepresentations to Grant pursuant to Tiffany's scheme or artifice to defraud Grant as described above, and in an attempt to induce Grant to accept the existence of the additional inventory and allow Tiffany to reflect that inventory on its financial statements, thus overstating its income and net worth.

(a) In February or March of 1978, defendant Kahn, in furtherance of the scheme to defraud Grant, telephoned from the Tiffany offices in St. Louis, Missouri, the managers of Tiffany's farm stores in Oelwein, Iowa, Sullivan, Illinois, Arcanum, Ohio and Macon, Mississippi, in violation of 18 U.S.C. § 1343, asking that they report to Grant that they were in possession of Tiffany inventory that, in fact, did not exist.

(b) In response to Kahn's fraudulent telephone request described in subparagraph (a) above, Robert E. Richner ("Richner"), Manager of the Trulock farm store in Macon, Mississippi, mailed to Tiffany a letter dated March 30, 1978 (Exhibit 3P) stating that Trulock possessed certain Tiffany inventory. In fact, the representations made in the letter were false and known by Richner to be false. Tiffany and Kahn, for the purpose of executing that scheme or artifice, caused the Richner letter to be delivered by mail to Tiffany on or about March 30, 1978 in violation of 18 U.S.C. § 1341. Tiffany then presented that letter to Grant.

(c) In response to Kahn's fraudulent telephone request described in subparagraph (a) above, Donald D. Myott ("Myott"), Manager of the Trulock American Farm Store in Oelwein, Iowa, mailed to Tiffany an undated, handwritten list (Exhibit 3Q) of Tiffany inventory which Trulock purportedly possessed. In fact, the representations made in the list were false and known by Myott to be false when made. Tiffany and Kahn caused the Myott letter to be delivered by mail to Tiffany in March of 1978 in violation of 18 U.S.C. § 1341. Tiffany then presented that letter to Grant.

(d) Tiffany represented to Grant that the reason the inventory had not been reported from all of the farm stores was that Tiffany was negotiating with the farm stores concerning the possibility of the managers' purchasing those stores from Tiffany. To support this representation Kahn solicited "letters of intent" from the farm store managers. Kahn, or someone acting at his direction, prepared a form letter which was mailed to each of the farm store managers for signature (Exhibits 3R, 3S, 3T and 3U). The letters stated that the manager intended to purchase the particular farm store that he operated and listed items to be purchased. The managers were induced to sign these "letters of intent" and to mail them back to Tiffany in violation of 18 U.S.C. § 1341. The information stated in the letters did not accurately reflect the status of the negotiations at the dates of the letters.

(e) The above-described violations of 18 U.S.C. §§ 1341 and 1343 were part of a pattern of racketeering activity through which defendants conducted the affairs of the enterprises in violation of 18 U.S.C. § 1962(c) in an attempt to deceive and defraud Grant allowing Tiffany to reflect that inventory on its financial statements.

(iv) **Press Releases, SEC Filings, and Reports to Shareholders.**

29. Defendants, pursuant to the scheme or artifice to defraud Grant and others and knowing that Tiffany's financial position during the year 1977 was unsound, sought to conceal its true financial condition from its creditors, shareholders and the investing public. As a part of the scheme or artifice to deceive, Tiffany issued and filed certain false and misleading Quarterly Reports on Form 10-Q, and distributed false and misleading statements in Quarterly Reports to Shareholders and Press Releases. These misleading documents, described more particularly below, were provided to Grant and disseminated to the SEC, shareholders and investing public through the mails. The various SEC filings, shareholder reports and press releases were

based on financial statements which were not audited by Grant or reviewed prior to filing or mailing. Instead, Tiffany provided Grant with copies of the documents after they had been disseminated to others. Tiffany falsely represented to Grant that the information contained in the documents was a true and accurate description of Tiffany's financial condition. In fact, the documents were false and misleading and were given to Grant to deceive Grant and to induce Grant to aid and abet Tiffany in promulgating a false picture of its financial condition. Tiffany intended that Grant rely on the false information provided when Grant audited Tiffany's 1977 financial statements. In fact, Grant was induced to rely on such false and misleading information and would not have, had it known of the fraud, continued to agree to conduct the audit of Tiffany's 1977 financial statements or render any accounting services to Tiffany.

The above-described statements were created, reviewed and/or signed by Kahn and Simpkins, with knowledge that they contained false and misleading information, or with knowledge that matters were omitted which were necessary to make the statements not misleading. The use of the mails, described in detail hereafter, in disseminating these materials violated 18 U.S.C. § 1341.

(a) On or about August 12, 1977, Tiffany filed a Quarterly Report on Form 10-Q with the Securities and Exchange Commission covering the three-month and six-month periods ended June 30, 1977 ("June 1977 10-Q") (Exhibit 3V). Tiffany, Kahn, Simpkins and Appel created, reviewed or participated in the filing. The June 1977 10-Q was materially false and misleading in that, *inter alia,* it materially overstated Tiffany's sales, net earnings, accounts receivable, shareholders' equity and working capital, and in that it omitted to disclose that a condition of default existed under the terms of certain financing agreements, and in that it failed to disclose that substantial losses were expected for the year 1977. The above representations and omissions were material and false, and known to be so at the time

they were made. Upon information and belief, Tiffany filed the June 1977 10-Q with the SEC by use of the United States mails. Tiffany presented to Grant a copy of the June 1977 10-Q, falsely representing to Grant that it reflected a true and accurate statement of Tiffany's financial condition.

(b) In August of 1977 Tiffany mailed to its shareholders a report entitled "Tiffany Industries, Inc., Second Quarter reports to Shareholders" ("1977 Second Quarter Report"), signed by Kahn and Simpkins (Exhibit 3W). Tiffany provided to Grant a copy of that report, intending that Grant rely on the false statements contained therein. Kahn or Simpkins prepared or reviewed the report. It contained many of the material misrepresentations contained in the June 1977 10-Q. It represented that Tiffany's sales for the second quarter of 1977 were higher than those for the second quarter of 1976. It represented that Tiffany's enterprises in Africa were becoming more substantial in both volume and scope. In fact, the representations were false and were known to be false when made. As of August 1977 Tiffany anticipated substantial losses for 1977, but the report failed to disclose such anticipation.

(c) In August of 1977, Tiffany issued a press release (Exhibit 3X) which summarized the 1977 Second Quarter Report to the shareholders. The press release was prepared or reviewed by Kahn, Simpkins or Appel, or other Tiffany officers or employees acting at their direction. The press release stated that Tiffany's sales for the second quarter of 1977 were higher than for the same period of 1976. That statement was false and known to be false when made. The press release failed to disclose that substantial losses were anticipated for 1977. A copy of the press release was given to Grant. Upon information and belief, Tiffany presented the press release, through use of the mails, to various members of the news media.

(d) On or about November 14, 1977, Tiffany filed a Quarterly Report on Form 10-Q with the Securities and Exchange Commission covering the three-month and nine-month periods end-

ed September 30, 1977 ("September 1977 10-Q") (Exhibit 3Y). Tiffany, Kahn, Simpkins and Appel created, reviewed or participated in the filing. The September 1977 10-Q was materially false and misleading because, *inter alia,* it materially overstated sales, net earnings, accounts receivable, shareholders' equity and working capital, it omitted to disclose that a condition of default existed under the terms of certain financing agreements, and it failed to disclose that substantial losses were expected for the year 1977. The above representations and omissions were material and false, and known to be so at the time they were made. Grant did not audit the financial statements on which the 10-Q was based. Upon information and belief, Tiffany filed the September 1977 10-Q by use of the mails. Tiffany provided a copy to Grant, representing to Grant that it reflected a true and accurate statement of Tiffany's financial condition. Said report was given to Grant with intent to induce Grant to rely on the false information therein, pursuant to the scheme or artifice to defraud Grant.

(e) In November of 1977 Tiffany mailed to its shareholders a report entited "Tiffany Industries, Inc., 1977 Third Quarter Report to Shareholders" ("1977 Third Quarter Report"), signed by Kahn and Simpkins (Exhibit 3Z). That report contained material misrepresentations and omitted disclosure of material information necessary to make the report not misleading. The 1977 Third Quarter Report contained many of the misstatements included in the September 1977 10-Q. Additionally, it represented that Tiffany had record high backlogs with reference to its export business, when in fact no significant backlogs existed. The 1977 Third Quarter Report stated that Tiffany "is on a course to one of its finest sales years" and that the outlook was for "earnings growth that is commensurate with these new sales plateaus." In fact, Tiffany's sales and earnings were not growing. Tiffany anticipated significant losses for the year 1977, but that fact was not disclosed in the 1977 Third Quarter Report. Tiffany, Kahn, Simpkins and Appel, or other Tiffany officers or employees acting at their direction, prepared

or reviewed the 1977 Third Quarter Report and knew that it contained false statements.

(f) In November of 1977, Tiffany issued a press release (Exhibit 4A) which summarized the 1977 Third Quarter Report to the shareholders. The press release was prepared or reviewed by Kahn, Simpkins or Appel, or other Tiffany officers or employees acting at their direction. The press release falsely stated that Tiffany's export activities had significant backlogs and that sales and earnings were growing, when in fact both statements were false. The press release failed to disclose that substantial losses were anticipated for 1977. A copy of the press release was given to Grant. Upon information and belief, Tiffany presented the press release, through use of the mails, to various members of the news media.

(g) The above described uses of the mails in violation of 18 U.S.C. § 1341 were part of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c), for the purpose of deceiving and injuring Grant.

(v) **Further Course of Conduct; Injury to Plaintiff.**

The defendants' above described violations of 18 U.S.C. § 1962(c) were directed at Grant with the intent of injuring Grant and did injure Grant in its business and property in the following respects:

30. Throughout the course of the (uncompleted) audit by Grant of Tiffany's books and records for 1977, Tiffany officers, agents and employees (or others acting in Tiffany's behalf) impeded and obstructed the ordinary course of the audit and engaged in a conspiracy to conceal relevant facts from Grant and to defraud and mislead Grant. As the result of such conspiratorial and fraudulent conduct, the time required by Grant personnel to conduct the audit was substantially enlarged over the time which would have been required had Tiffany not

engaged in such conduct, thus increasing the amount of Grant's bill for its services. Tiffany was well aware that the charges by Grant to Tiffany for audit services would be based upon the time spent by Grant personnel. In further perpetration of this fraudulent and criminal conspiracy, Tiffany attempted to deceive Grant and to induce Grant to complete its audit and certify Tiffany's fraudulent transactions first by withholding payment; then, when the fraudulent and criminal conduct was disclosed, Tiffany sought to conceal said conduct by promising to pay Grant in full.

31. Had Grant been aware of the activities of defendants as above alleged, it would not have performed any accounting services for Tiffany in connection with the 1977 audit. As a result of the fraudulent conduct of defendants as described above, none of which was known or disclosed to Grant, the personnel of Grant continued to perform accounting services for defendant, all to Grant's injury to its business and property. Because Tiffany had no intention of paying Grant's bill for its services, the actions of defendants and Tiffany's other officers, agents and employees in impeding the audit as described above had the effect of increasing the ultimate damages suffered by Grant.

32. Through late April, 1978, defendants attempted to conceal (and are continuing to conceal) their fraudulent and unlawful acts. In late April, 1978 when Grant confirmed that defendants had used forged and fictitious documents in an attempt to defraud Grant and in a further attempt to publish misleading and fraudulent financial reports, Grant promptly advised Tiffany and its counsel that Grant would report its findings to the SEC as required by SEC Regulations. Following that report, the SEC commenced an intensive investigation of Tiffany which resulted in the SEC's suing Tiffany and others for injunctive relief. Following Grant's report to the SEC, Tiffany terminated Grant and refused to pay Grant for its services.

33. As the result of the SEC investigation, which was necessitated by and resulted directly from the unlawful and

fraudulent actions of defendants, Grant has incurred substantial expenses in excess of $250,000 in responding to SEC subpoenas and requests for documents, interviews, the giving of testimony, counsel fees related to same, and other related expenses.

34. At the time Grant's allegations were made public and the SEC commenced its investigation, Tiffany and Simpkins announced that the company would make a full internal investigation into the allegations, and that the results of that investigation would be made public. A "Special Inquiry Committee" was formed, consisting of one of Tiffany's outside directors and two independent persons. The Special Inquiry Committee investigated and provided a report to Tiffany's board. The report revealed massive fraud involving upper levels of Tiffany management. Tiffany did not make the report public as it had promised to do. Had Tiffany disclosed the report instead of further attempting to conceal the fraud, Grant's damages would have been mitigated, rather than increased as they were by the continued concealment. Defendants Tiffany and Simpkins have, from time to time after Grant's initial discovery of the fraud, issued public statements and press releases attempting to blame Grant for the fraud of Tiffany's management and indicating that Tiffany's problems do not involve violations of law but instead are little more than "disputes" with its former auditors. As a result of Tiffany's fraud, concealment of that fraud, and attempts to place public blame on Grant, Grant has been injured in its reputation as a national independent public accounting firm.

35. In furtherance of its fraudulent and unlawful actions, Tiffany (beginning in early May, 1978) promised to pay Grant all fees owed (totaling $258,000), whereas Tiffany intended not to pay Grant at all, but in induce Grant to limit its response to the SEC and to lend its reputation to representations made to the SEC by Defendants.

36. As the result of the foregoing, Grant has been damaged in the sum of $1,500,000.

WHEREFORE, plaintiff (Grant) prays for judgment on Count I against defendants in the sum of $1,500,000; further, in accord with 18 U.S.C. § 1964(c), that said award of damages be trebled, and that plaintiffs further recover the costs of this action and reasonable attorneys fees.

COUNT II

COMES NOW plaintiff Alexander Grant and Co., and for Count II of its claim against defendant Tiffany Industries, Inc., states:

1. Jurisdiction of Count II is founded on the doctrine of pendent jurisdiction, in that the claim on which Count II is based and the RICO claim on which Count I is based arose from the same transaction and from a common nucleus of operative fact.

2. Repeats and realleges the allegations of paragraphs 4 and 5 of Count I as this paragraph 2 of Count II.

3. Plaintiff Alexander Grant & Company was retained by defendant Tiffany Industries, Inc. to audit the financial statements of Tiffany Industries, Inc.

4. Plaintiff Alexander Grant & Company performed services for Tiffany Industries, Inc. in accordance with its retainer by Tiffany Industries, Inc. and in accordance with generally accepted auditing standards.

5. Tiffany Industries, Inc. owes Alexander Grant & Company $258,000.00 for its services rendered to Tiffany during 1977 and 1978.

6. The fees charged for said services were reasonable and proper at the time said services were performed.

7. Tiffany Industries, Inc. in early May, 1978 promised to pay Alexander Grant & Company all fees owed to Grant

($258,000.00). However, although subsequent demand has been made by Alexander Grant & Company, Tiffany has failed and refused, and continues to fail and refuse to pay any or all of the aforementioned amount, which is presently due and owing.

WHEREFORE, plaintiff Alexander Grant & Company prays judgment on this Court II of its claim against defendant Tiffany Industries, Inc. in the principal sum of $258,000.00, together with interest at the legal rate, and that Alexander Grant & Company further recover the costs of this action and a reasonable attorney's fee.

COUNT III

COMES NOW plaintiff Alexander Grant & Company ("Grant") and for Count III of its claim against defendant Tiffany Industries, Inc. ("Tiffany") states and alleges as follows:

1. Jurisdiction of Count III is founded on the doctrine of pendent jurisdiction, in that the claim on which Count III is based and the RICO claim on which Count I is based arose from the same transaction and from a common nucleus of operative facts.

2. Repeats and realleges the allegations of paragraphs 4 and 5 of Count I as this paragraph 2 of Count III.

3. From 1970 until the spring of 1978 Grant was retained by Tiffany as its outside auditor pursuant to the terms of written engagements.

4. At all relevant times, the activities of Tiffany were carried out by Tiffany's agents on behalf of Tiffany.

5. Sometime prior to June 30, 1977, the exact time of which is presently unknown to Alexander Grant & Company, Tiffany Industries, Inc., through its authorized agents, made and circulated to Alexander Grant & Company false, misleading and fraudulent information and documents, intending that Grant

accept such false, misleading and fraudulent information and permit Tiffany to include such information in Tiffany's financial statements.

6. In its efforts to seek to induce Grant's assistance as set forth in paragraph 5, Tiffany made the following misrepresentations described more fully in paragraphs 13 through 33 of Count I, which allegations are repeated herein as this paragraph 6 of Count III.

7. The foregoing representations and conduct were misrepresentations of material facts made and perpetuated by Tiffany with actual knowledge of their falsity, with the intent to deceive Alexander Grant & Company, and with the intent to induce Alexander Grant & Company to rely on said misrepresentations to its detriment.

8. As a direct and proximate result of said misrepresentations and conduct, Alexander Grant & Company has been damaged in reputation, business and property in the amount of $1,500,000.00.

9. The acts and conduct of Tiffany as described above were wanton, willful and malicious. An award of punitive damages is necessary and appropriate to punish Tiffany and to deter it from like conduct in the future.

WHEREFORE, Alexander Grant & Company prays judgment on this Count III of its claim against defendant Tiffany Industries, Inc. in the sum of $1,500,000; and that Alexander Grant & Company further recover the costs of this claim and reasonable attorneys' fee.

Respectfully submitted,

Walter M. Clark

Thomas E. Wack

Catherine D. Perry
611 Olive Street, Suite 1950
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for Plaintiff

OF COUNSEL:

ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

Certificate of Mailing

I certify that I hand-delivered a copy of the foregoing First Amended Complaint to all counsel of record on this 19th day of August, 1982.

Catherine D. Perry

APPENDIX B

S. 1521

99th Congress
1st Session

To clarify the intent of the Racketeer Influenced and Corrupt Organizations Act with respect to private civil actions.

IN THE SENATE OF THE UNITED STATES

July 29 (legislative day, July 16), 1985

Mr. Hatch introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To clarify the intent of the Racketeer Influenced and Corrupt Organizations Act with respect to private civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person suffering competitive, investment, or other business injury as a result of a violation of section 1962 of this chapter involving a pattern of racketeering activity may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fees.

"(2) For purposes of this subsection, 'pattern of racketeering activity' shall require that at lease one act of racketeering activity shall be an act of racketeering activity other than—

"(i) an act indictable under section 1341 of title 18, United States Code;

"(ii) an act indictable under section 1343 of title 18, United States Code; or

"(iii) an act which is an offense involving fraud in the sale of securities.

"(3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the cost of the suit including reasonable attorney's fees to the defendant.".

H.R. 2517

99th Congress
1st Session

To amend chapter 96 of title 18, United States Code

IN THE HOUSE OF REPRESENTATIVES

May 15, 1985

Mr. Conyers introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Definitional Amendments.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" and inserting "predicate criminal" in lieu thereof;

(2) so that paragraph (4) reads as follows:

"(4) 'enterprise' means a business or other similar business-like undertaking by an association of persons, whether organized for legitimate or illegitimate purposes, and includes a government or government agency;";

(3) so that paragraph (5) reads as follows:

"(5) 'pattern of criminal activity' means two or more acts of predicate criminal activity, separate in time and place—

"(A) each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity;

"(B) all of which are not violations of the same provision of law, if that provision of law is—

"(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;

"(ii) section 1341 (relating to mail fraud) of this title; or

"(iii) section 1342 (relating to wire fraud) of this title; and

"(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events;";

(4) by striking out "and" at the end of paragraph (9);

(5) by striking out the period at the end of paragraph (10) and inserting "; and" in lieu thereof; and

(6) by adding at the end the following:

"(11) 'criminal syndicate' means an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity, other than a pattern of criminal activity consisting solely of conduct constituting a felony under section 1084 of this title or under the law of a State relating to engaging in a gambling business.".

Sec. 2. Offense Amendments.

Section 1962 of title 18, United States Code, is amended—

(1) by inserting after the heading of such section the following new subsection:

"(a) It shall be unlawful for any person knowingly to organize, own, control, finance, or otherwise participate in a supervisory capacity in a criminal syndicate.";

(2) by redesignating subsections (a), (b), and (c) as subsections (b), (c), and (d), respectively;

(3) in the subsection redesignated as subsection (b) by paragraph (2)—

(A) by striking out "racketeering activity" each place it appears and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to use or invest";

(4) in the subsection redesignated as subsection (c) by paragraph (2)—

(A) by striking out "racketeering activity" and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to acquire or maintain";

(5) in the subsection redesignated as subsection (d) by paragraph (2)—

(A) by striking out "racketeering activity" and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to conduct or participate"; and

(6) by striking out the subsection designated (d) without regard to the redesignations made by paragraph (2).

Sec. 3. Section 1963 Amendments.

Section 1963(a) of title 18, United States Code, is amended—

(1) by striking out "any provision of section 1962 of this chapter" and inserting "section 1962" in lieu thereof;

(2) by inserting "in the case of a violation of a subsection other than subsection (a) of such section" after "shall" the first place it appears; and

(3) by inserting "and in the case of a violation of subsection (a) of such section be fined not more than $250,000 or imprisoned not more than 30 years, or both," after "or both,".

Sec. 4. Clerical Amendments.

(a) Heading For Chapter. — The heading of chapter 96 of title 18, United States Code, is amended by striking out **"Racketeering Influenced And Corrupt Organizations"** and inserting **"Criminal Enterprises And Corruption Of Enterprises"** in lieu thereof.

(b) Table Of Chapters. — The table of chapters at the beginning of part I of title 18, United States Code, is amended so that the item relating to chapter 96 is amended to read as follows:

"96. Criminal enterprises and corruption of enterprises..1961".

H.R. 2943

99th Congress
1st Session

To amend section 1964 of title 18, United States Code, with respect to certain civil remedies for persons injured by racketeering activity.

IN THE HOUSE OF REPRESENTATIVES

July 10, 1985

Mr. Boucher (for himself, Mr. Fish, Mr. Gekas, and Mr. Hyde) introduced the following bill; which was referred to the Committee on the Judiciary)

A BILL

To amend section 1964 of title 18, United States Code, with respect to certain civil remedies for persons injured by racketeering activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That section 1964(c) of title 18, United States Code, is amended—

(1) by striking out "a violation" and inserting "conduct in violation" in lieu thereof;

(2) by striking out "therefor" and inserting "any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or of a violation of section 1962" in lieu thereof;

(3) by inserting a comma after "district court"; and

(4) by adding at the end the following: "A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises.".